

No. 25-

IN THE
Supreme Court of the United States

JIBRIL ADAMU,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the crime of possession with intent to distribute under 21 U.S.C. §959(c)(2) applies extraterritorially.
2. Whether a non-testifying analyst's statements in a cellphone extraction report are testimonial hearsay, rather than "raw, machine-created data," and are thus subject to the Sixth Amendment's Confrontation Clause.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Jibril Adamu*, No. 1:18-cr-601-PGG-9, U.S. District Court of the Southern District of New York. Judgment entered on May 18, 2023.
- *United States v. Jibril Adamu and Jean-Claude Okongo Landji*, No. 23-6561 (L), 23-6696 (CON), U.S. Court of Appeals for the Second Circuit. Judgment entered on July 21, 2025.
- *Landji v. United States*, No. 25-5908 (Supreme Court of the United States) (2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jibril Adamu respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Order of the Second Circuit dated July 21, 2025, is unreported and available at 2025 WL 2025147 and reproduced in Petitioner's Appendix ("App.") at 1a. The Orders of the U.S. District Court for the Southern District of New York are reproduced beginning at App.22a.

JURISDICTION

The Second Circuit entered final judgment on July 21, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 959 of Title 21, U.S. Code provides:

POSSESSION, MANUFACTURE, OR DISTRIBUTION OF
CONTROLLED SUBSTANCE—

- (a) **MANUFACTURE OR DISTRIBUTION FOR PURPOSE OF UNLAWFUL IMPORTATION.** It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II or flunitrazepam or a listed chemical intending, knowing, or having reasonable cause to believe that such substance or chemical will be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States.
- (b) **MANUFACTURE OR DISTRIBUTION OF LISTED CHEMICAL FOR PURPOSE OF MANUFACTURE OR UNLAWFUL IMPORTATION OF CONTROLLED SUBSTANCE.** It shall be unlawful for any person to manufacture or distribute a listed chemical—
- (1) intending or knowing that the listed chemical will be used to manufacture a controlled substance; and
 - (2) intending, knowing, or having reasonable cause to believe that the controlled substance will be unlawfully imported into the United States.
- (c) **POSSESSION, MANUFACTURE, OR DISTRIBUTION BY PERSON ON BOARD AIRCRAFT.** It shall be unlawful for any United States citizen on

board any aircraft, or any person on board an aircraft owned by a United States citizen or registered in the United States, to—

- (1) manufacture or distribute a controlled substance or listed chemical; or
- (2) possess a controlled substance or listed chemical with intent to distribute.

(d) ACTS COMMITTED OUTSIDE TERRITORIAL JURISDICTION OF UNITED STATES. This section is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States.

INTRODUCTION

This petition presents two important issues that have divided lower courts. The first pertains to the extraterritorial reach of 21 U.S.C. §959. Over the last two decades, this Court has repeatedly emphasized there is a presumption against extraterritoriality. Courts should not apply federal laws extraterritorially unless Congress “affirmatively and unmistakably” instructs them to do so. *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 335 (2016).¹ Yet, the Second and Fifth Circuits have deviated from this Court’s clear instruction. *See United States v. Epskamp*, 832 F.3d 154 (2d Cir. 2016); *United States v. Lawrence*, 727 F.3d 386 (5th Cir. 2013). In *Lawrence* and *Epskamp*, the Fifth and Second Circuits, respectively,

1. Unless otherwise noted, case text quotations omit all internal quotation marks, citations, alterations and footnotes.

held that possession with intent to distribute under §959 applies extraterritorially, although that statute plainly says otherwise. It identifies only the crimes of distribution and manufacture as applying extraterritorially. The Second Circuit followed *Epskamp* here. The D.C. Circuit, however, has concluded that *Lawrence* and *Epskamp* were wrongly decided. *See United States v. Thompson*, 921 F.3d 263, 268 (D.C. Cir. 2019). It discerned no ambiguity in §959 and applied the plain text of the statute to conclude possession with intent to distribute under §959 does not apply extraterritorially. There is thus a clear circuit split between the D.C. Circuit and the Second and Fifth Circuits. This same issue is likely to arise in numerous cases in coming years, consuming limited judicial resources in jurisdictions where it remains an open question. This Court should grant certiorari to resolve the circuit split.

The second issue is whether a defendant has a right to confront a non-testifying analyst about his statements in a cellphone extraction report regarding the extraction process. Just last year, this Court held in *Smith v. Arizona*, 602 U.S. 779 (2024), the Confrontation Clause “applies in full to forensic evidence,” such that “a prosecutor cannot introduce an absent laboratory analyst’s testimonial out-of-court statements to prove the results of forensic testing.” *Id.* at 783. But, only months later, the Second Circuit misinterpreted *Smith*. It affirmed the government’s presentation of surrogate witness testimony about the process a non-testifying analyst used to extract data from cellphones—information the witness, who was not involved in the extractions, simply read from the extraction reports to the jury. Although the reports contained the analyst’s statements about the extraction

process, the Second Circuit incorrectly held the entire “cellphone extraction reports were not ‘statements’” under Federal Rule of Evidence 801, but rather “raw, machine-created data.” App.19a.

The Second Circuit’s position is an outlier. Other courts have held, where an extraction report reflects human input, that report contains testimonial hearsay. *See United States v. Arce*, 49 F.4th 382, 391-92 (4th Cir. 2022); *United States v. Juhic*, 954 F.3d 1084, 1089 (8th Cir. 2020); *United States v. Hajbeh*, 565 F. Supp. 3d 773, 776-77 (E.D. Va. 2021). However, where the report contains *only* data from the cellphone, rather than human input, it does not. *See United States v. Hill*, 63 F.4th 335, 359 (5th Cir. 2023); *Baldwin v. Commonwealth*, 2025 Ky. LEXIS 212, at *30-33 (Ky. Sept. 18, 2025). This Court should grant certiorari to clarify that, under *Smith*, where an extraction report contains a non-testifying analyst’s statements about the extraction process, the government may not introduce it without violating the Confrontation Clause. Due to the government’s ubiquitous use of extraction reports in criminal prosecutions, clarity from this Court is vital to protect defendants’ confrontation rights.

STATEMENT OF THE CASE

A. Procedural History

On October 30, 2018, Croatian authorities arrested Petitioner Adamu and his co-defendant Landji, after allegedly finding one kilogram of cocaine on board the plane they flew from West Africa to Croatia. Following extradition, on October 25, 2021, a jury found them guilty on the sole count, charging conspiracy to possess with

intent to distribute and distribute cocaine under §959(c). (App.22a-23a).² The district court sentenced Adamu to the mandatory minimum 10 years' imprisonment. Adamu subsequently appealed his conviction. On July 21, 2025, the Second Circuit affirmed.

B. The Lower Courts Ruled §959(c)(2) Applies Extraterritorially

On October 7, 2020, Adamu moved to dismiss the indictment for lack of jurisdiction, arguing the statute has no extraterritorial application. The court denied this motion on April 28, 2021, holding *Epskamp* was dispositive. The Second Circuit affirmed, likewise holding *Epskamp* controlled.

C. The Cellphone Extraction Reports

The Croatian National Police (“CNP”) seized three cellphones from the plane on October 30, 2018, but did not produce them to the government until October 15, 2019. (Tr.188, 206).³ There is no record evidence of how CNP stored the phones during that year. (Tr.879-80).

In January 2019, CNP analyst Ante Bakmaz conducted cellphone extractions, generating three extraction reports using Cellebrite (the “Extraction Reports”). (See GX:501, GX:502, GX:503). Based on these reports, the government sought to admit at trial evidence recovered from two

2. The district court exercised jurisdiction under 18 U.S.C. §3231.

3. “Tr.”, “DE”, and “GX” mean trial transcript, district court docket entry, and government exhibit, respectively.

phones it claimed belonged to Landji (GX:500A and 500B) and one it claimed belonged to Adamu (GX:500C). It did not, however, seek to introduce these reports through Bakmaz, but rather through Enrique Santos, an investigative analyst with the U.S. Attorney's Office, who was not involved in CNP's extractions. (*See* DE:585).

On October 11, 2021, the defense moved to exclude these reports on Confrontation Clause grounds. (DE:583). The court subsequently denied the motion. (App.32a). Santos testified on October 20, 2021, and the defense renewed its objection. (Tr.741-43). The court supplemented its previous ruling on October 21, permitting Santos to testify. (App.117a-118a).

Santos acknowledged he did not review the phones' contents—he only reviewed the Extraction Reports (Tr.878-79), which the government admitted into evidence. Santos's knowledge of the extraction process Bakmaz conducted was limited to what he read in Bakmaz's reports (Tr. 882-83), and that information is what he conveyed to the jury. Generally, Santos testified to Bakmaz's out-of-court statements that he conducted the extractions of the three phones as a CNP member, on a particular date and time, using particular equipment, after selecting a certain profile and extraction type, resulting in the recovery of data, which he supplemented with manual screenshots, and then categorized in reports. (*See, e.g.*, Tr.791-94).

While Bakmaz's statements were reflected in the computer-generated Extraction Reports, there is no question he input information about the process into the reports, either by writing it into the reports or selecting certain options within Cellebrite. Santos explained as

much, when he testified about the extraction process. (Tr.729-31, 752; Tr.791). He explained an analyst conducts a three-step process to complete a cellphone extraction, proceeding through the acquisition, analysis, and reporting phases. (*See* Tr.730-31, 777-79). An extraction report reflects the analyst's choices and input into the program at each step of the process. Santos explained he had received extensive training on this process. (Tr.728-29, 752).

During the acquisition phase, the “user of the Cellebrite software selects the profile in Cellebrite that matches the phone, selects the type of extraction to perform, connects the phone to a computer or some other forensics tool, and then downloads whatever data is possible off of the phone” to create a forensic image. (Tr.777-78). The analyst must determine which type of extraction to run, because not every phone supports every type of extraction. (Tr.791). For example, a “logical extraction” is the most widely supported, but captures the least data; a “file system extraction” captures additional data, but is supported by fewer phones; and a “physical extraction” is supported by the fewest phones, but captures the most data. (Tr.791, 882). The analyst also may use the program to take manual screenshots of data. (Tr.790-92). The analyst also must determine how many extractions to run, recognizing multiple extractions present a risk of altering the data. (Tr.891-92).

At the analysis phase, the analyst “pull[s] out the data that was recorded and sort[s] it out into different parts.” (Tr.779). “For example, all the different chats would be put together, all the different images, the videos, web browsing history, and the like.” *Id.* Finally, at the

reporting phase, the analyst creates “a report that gets turned over to a prosecutor or agent.” *Id.* “A user of the Cellebrite software can, however, exclude certain items from a report, as either entire categories of data or very specific records,” for example, to comply with “a limitation imposed by a search warrant.” *Id.*

Bakmaz’s Extraction Reports contain his written and non-verbal statements, detailing his extraction process; the reports reflect information he input and selected in Cellebrite showing his actions. More specifically, in each Extraction Report, Bakmaz identified himself as the CNP examiner conducting the extraction, and he input the case number. (*See* GX:501, GX:502, GX:503). The reports capture the date and time he created it. *Id.* They show, at the acquisition phase, he selected certain phone profiles (*i.e.*, “Selected Manufacturer” and “Selected Device Name”); he used certain cables to connect each phone to his device (*i.e.*, “Connection Type”), and he selected certain types of extractions to run for each phone (*i.e.*, “Extraction Type”). *Id.* The extraction types vary by phone, reflecting the different choices he made in the software (“File system,” “Logical,” or “Physical”). *Id.* The reports also show, on one device, Bakmaz chose to run two logical extractions, because the first omitted audio files. (Tr.792; GX:501). The reports further reflect Bakmaz took manual screenshots for two devices (designated as “Phone Evidence”). (Tr.790; GX:501, GX:502). The reports show the different categories of data, such as text messages, call logs, videos and photos, Bakmaz categorized and included. (*See, e.g.*, Tr.752, 794, 804, 836-40, 848-49, 852). Finally, the reports contain his “Extraction Notes,” such as noting for one phone “[e]mail extraction on Apple devices is only available for jail-broken devices,” as well as noting for

two phones that “time zone is expressed in quarters of an hour” and the “last IMEI digit might be incorrect.” (GX:501, GX:502, GX:503).

On the witness stand, Santos repeated Bakmaz’s out-of-court statements. For example, when the prosecutor asked him to identify who conducted the extractions, Santos testified “[p]art of the report lists the person who conducted that examination, and...there was a logo for [CNP]....” (Tr.737-38). Regarding the first Extraction Report, the prosecutor asked Santos how Bakmaz conducted the extraction process. Santos stated he could tell “the Cellebrite profile for the iPhone 7 Plus A1784 was used to create the image for [the cellphone],” because “one of the rows [in the report] lists selected device name, and it lists iPhone 7 Plus model A1784.” (Tr.789-90). Santos also stated he read the phone was connected to Cellebrite using “cable No. 210,” which is a “lightning cable.” *Id.* He further stated he read Bakmaz conducted a file system extraction, two logical extractions (one of which excluded audio files) and took manual screenshots. (Tr.790-92). The prosecutor proceeded to ask Santos similar questions for the other two Extraction Reports, and Santos repeated Bakmaz’s out-of-court statements about the process each time. (*See* Tr.831-34, 853-55). Based on the reports, Santos testified he had “confirmed that everything looks legitimate.” (Tr.739).

The government relied on the Extraction Report evidence extensively at trial. Santos testified for hours regarding “voluminous” evidence in the reports, including photographs, videos, call logs, and text messages. (*See, e.g.*, Tr.796-802, 835-41, 856-60). Indeed, the government admitted 140 exhibits derived therefrom. The government

relied extensively on this evidence during its jury addresses, particularly focusing on text messages, calls, photographs, and videos shared among Adamu and alleged co-conspirators, Youssouf Fofana, Landji, and David Cardona-Cardona. (*See, e.g.*, Tr.967-75, 978-79, 982-89, 991, 998). The government repeatedly pointed to this evidence as key corroboration for Cardona-Cardona, a testifying cooperating witness. (*See, e.g.*, Tr.62, 989, 1105; App.52a-55a). The government relied so heavily on this evidence to corroborate him because he had serious credibility problems, as a confessed international drug kingpin, murderer and perjurer, who was testifying against his alleged low-level pilot, Adamu.

During deliberations, the jury followed the government's direction to review the text messages derived from the Extraction Reports when scrutinizing Cardona-Cardona's testimony. It requested "all texts/WhatsApp between Adamu and Fofana or Landji." (Tr. 1163). The court directed the jury to that evidence. (*See* Tr. 1174-76). Shortly thereafter, it returned a guilty verdict.

Following trial, Adamu moved for a new trial on various grounds, including the foregoing Confrontation Clause violation. (*See* DE:638-39). The court denied the motion. (*See* App.107a). The Second Circuit subsequently affirmed.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Split on Whether Possession with Intent to Distribute Under §959 Applies Extraterritorially

This Court should resolve the circuit split over whether possession with intent to distribute under §959(c) (2) applies extraterritorially. The Second and Fifth Circuits have held the statute applies extraterritorially. *See Lawrence*, 727 F.3d at 395; *Epskamp*, 832 F.3d at 162. Subsequently, in 2019, the D.C. Circuit rejected the reasoning of both courts, properly concluding the statute does not apply extraterritorially. *See Thompson*, 921 F.3d at 268. Here, the Second Circuit panel adhered to *Epskamp*.

This Court should reverse the Second Circuit’s decision, which is subject to *de novo* review. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 480 (1991). Section 959 does not “affirmatively and unmistakably” instruct it applies to possession with intent to distribute occurring abroad. *RJR Nabisco*, 579 U.S. at 335. As such, the presumption against extraterritoriality applies, and it does not criminalize such foreign conduct.

This circuit split is entrenched and creates inconsistencies in §959’s application. Defendants under the Fifth and Second Circuit’s jurisdiction, such as Adamu, are prejudiced because they can be prosecuted based on conduct that, had they been in the D.C. Circuit, would not be chargeable. This statute is regularly charged related to foreign conduct, so the issue will recur in future cases.

There is no impediment to addressing the issue here. This Court should grant the petition.⁴

A. The Statutory Text Plainly States There Is No Extraterritorial Jurisdiction

1. Section 959, which is set forth in full *supra* at 2-3, uses two different series of words at different points—“possession, manufacture or distribution” versus “manufacture or distribution.” Notably, the statute’s extraterritorial provision in §959(d) uses the latter series, not the former. Despite the clear omission of “possession” from the crimes listed in §959(d), the debate here is whether that statute nonetheless applies extraterritorially to the possession crime.

2. To determine whether this statute applies extraterritorially to possession with intent to distribute, this Court starts with the presumption against extraterritoriality. “It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” *Abitron Austria GmbH v. Hetronic Int’l, Inc.*, 600 U.S. 412, 417 (2023).

4. *Thompson, Epskamp*, and *Lawrence* addressed an earlier version of §959. Congress amended §959 in 2016 to add the current subsections (a) and (b), and to redesignate prior subsection (b) as subsection (c), and prior subsection (c) as subsection (d). The current §959(c)(2), at issue here, is identical to previous subsection §959(b)(2), discussed in *Thompson, Epskamp*, and *Lawrence*. In 2017, Congress amended subsection (d) again, eliminating its venue provision.

The question is not whether we think Congress would have wanted a statute to apply to foreign conduct if it had thought of the situation before the court, but whether Congress has *affirmatively and unmistakably* instructed that the statute will do so. When a statute gives no clear indication of an extraterritorial application, it has none.

RJR Nabisco, Inc., 579 U.S. at 335 (emphasis added).

3. “Applying the presumption against extraterritoriality involves a two-step framework.” *Abitron*, 600 U.S. at 417. “At step one, [the Court] determine[s] whether a provision is extraterritorial, and that determination turns on whether Congress has affirmatively and unmistakably instructed that the provision at issue should apply to foreign conduct.” *Id.* at 417-18. “If Congress has provided an unmistakable instruction that the provision is extraterritorial, then claims alleging exclusively foreign conduct may proceed....” *Id.* “If a provision is not extraterritorial, [the Court] move[s] to step two, which resolves whether the suit seeks a (permissible) domestic or (impermissible) foreign application of the provision.” *Id.*

At step one, the question of whether Congress has clearly expressed extraterritorial application is one of statutory interpretation. *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 115 (2013). Several principles of statutory interpretation are relevant here. “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”

Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004). “When the statutory language is plain, the sole function of the courts...is to enforce it according to its terms.” *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Indeed, “when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.” *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 265 (2010). In reviewing a statute for extraterritorial application, if there are “competing interpretations” of “ambiguous” language, the presumption against extraterritorial application controls. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 250-51 (1991) (“*Aramco*”). Moreover, in criminal cases, the rule of lenity operates as a further constraint against applying an ambiguous statute extraterritorially. See *United States v. Davis*, 588 U.S. 445, 464 (2019).

Perhaps most relevant here, the well-established canon of statutory interpretation *expressio unius est exclusio alterius* applies when considering whether a given statute applies extraterritorially to certain conduct identified in one portion of a statute, but not another. See *Thompson*, 921 F.3d at 266. “[I]n plain English,” the canon means “expressing one item of an associated group or series excludes another left unmentioned.” *Esteras v. United States*, 145 S.Ct. 2031, 2040 (2025). “Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.” *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015). It is a court’s task to “give effect to, not nullify Congress’ choice to include that factor in some provisions but not others.” *Esteras*, 145 S.Ct. at 2041. Thus, “[w]hen Congress includes particular language in one section of a

statute but omits it from a neighbor, [the Court] normally understand[s] that difference in language to convey a difference in meaning....” *Bittner v. United States*, 598 U.S. 85, 94 (2023). In fact, this Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Arlington*, 548 U.S. at 295.

4. Applying these principles, the presumption controls here, and §959 does not reach the crime of possession with intent to distribute abroad. In the statute’s title, as well as subsection (c), Congress used the series of words “possession, manufacture or distribution,” whereas in the neighboring subsections (a), (b) and (d) (the extraterritorial provision), it omitted the word “possession,” using only “manufacture or distribution.” This Court presumes Congress acted intentionally when it omitted the word “possession” from the extraterritorial provision in §959(d), per the *expressio unius* canon. This Court should “give effect” to Congress’s word choice and conclude the statute has no extraterritorial application to the possession crime. *See Esteras*, 145 S.Ct. at 2041 (“[T]he *expressio unius* canon has particular force here because the §3553(a) sentencing factors constitute an established series, such that any omission from that series necessarily bespeaks a negative implication.”); *MacLean*, 574 U.S. at 391 (“Congress’s choice to say ‘specifically prohibited by law’ rather than ‘specifically prohibited by law, rule, or regulation’ suggests that Congress meant to exclude rules and regulations.”). Congress certainly knew how to draft §959(d) to include the word “possession.” And, it certainly knows how to amend that provision to include the word, given it has amended §959 twice in the last ten

years. But it is not the judiciary's province to read a word into §959(d) that is not there.

Even if the statute were ambiguous (which it is not), this Court would resolve any ambiguity against extraterritoriality. In general, the presumption against extraterritoriality dictates that “competing interpretations” must be resolved in favor of the narrower application. But more specifically, here, Congress chose to specify the statute has extraterritorial application to “acts of manufacture and distribution,” and therefore the presumption operates to limit extraterritorial application to those specified terms, which exclude possession. Moreover, if any ambiguity exists, the rule of lenity further dictates the statute should be construed narrowly.

Accordingly, at step one, Congress did not “affirmatively and unmistakably” instruct §959 applies extraterritorially to the possession crime; thus, it does not. At step two, this Court examines whether this case involved an impermissible application of §959 to foreign conduct. Because all of Adamu’s alleged conduct occurred abroad (in Africa and Croatia), his conviction for conspiracy to possess with intent to distribute under §959(c)(2) cannot stand. *See Abitron*, 600 U.S. at 419.

B. The D.C. Circuit Correctly Held There Is No Extraterritorial Jurisdiction

1. In *Thompson*, the panel majority correctly applied the “long-held presumption against extraterritoriality.” 921 F.3d at 268. There, like here, the defendants—who had never stepped foot in the United States—were convicted of conspiracy to distribute and possess with intent to

distribute cocaine on an aircraft. *Id.* at 265. The court agreed with the defendants the statute does not apply extraterritorially to possession with intent to distribute. *Id.*

The court first concluded Congress's omission of the possession crime "from the extraterritoriality provision could not be a more striking illustration of the interpretive maxim *expressio unius est exclusio alterius*." *Id.* at 266. It "certainly appear[ed] that Congress did not intend possession with intent to distribute to be extraterritorial." *Id.* Indeed, the court observed it was "unlikely that congressional draftsmen would draft a provision explicitly providing for extraterritoriality only with respect to acts of manufacture and distribution, strikingly omitting the crime of possession with intent to distribute, yet somehow intending extraterritoriality to apply to all three acts." *Id.* at 268.

2. The D.C. Circuit acknowledged the Second and Fifth Circuits had "concluded that, notwithstanding the language of the statute, Congress could not have intended to treat possession with intent to distribute only domestically," but it declined to follow suit. *Id.* at 266. The court rejected the government's arguments, relying on those cases, which "attempt[ed] to create ambiguity where, in [the court's] view, none exists." *Id.*

The government first argued "the words 'acts of' before 'manufacture or distribution' in §959(c) [now §959(d)] suggest an intent to include in the word 'acts' 'possession with intent to distribute' because possession is an act antecedent to distribution." *Id.* The court rejected this argument as an "unlikely reading—that the 'acts' of

distribution would include myriad preceding acts.” *Id.*; see also *United States v. Gore*, 154 F.3d 34, 45 (2d Cir. 1998) (“[O]ffense of distribution obviously does require an element not required for the crime of possession with intent, namely, the act of distribution.”); *United States v. Colon*, 268 F.3d 367, 376 (6th Cir. 2001) (“[T]he crime of distribution...can be committed without actually ever possessing the controlled substance.”) (collecting cases).

The court also rejected as “even less likely” the argument that the phrase “this section” at the beginning of the extraterritoriality provision somehow implied all of §959 is extraterritorial, including the possession crime. *Thompson*, 921 F.3d at 267. Indeed, the extraterritoriality provision states: “*This section* is intended to reach acts of *manufacture or distribution* committed outside the territorial jurisdiction of the United States.” §959(d) (emphasis added). As each other subsection (a), (b) and (c) in §959 includes the crimes of “manufacture and distribution,” it is appropriate for the extraterritorial provision to refer to “this section” when identifying the extraterritorial reach of those crimes, which are referred to in every subsection. Thus, in line with the D.C. Circuit’s holding, that language does not somehow mean the specifically excluded crime of “possession” also is extraterritorial.

The court likewise rejected the government’s argument that, if it did not apply extraterritorially, the possession crime under §959 would be superfluous, because it is already domestically illegal under 21 U.S.C. §841. *Thompson*, 921 F.3d at 266-67. The court stated that, “[a]s to the claim of superfluity, we have previously said unlike two provisions within a single statute, we need

not construe separate statutes to avoid redundancy.” *Id.* at 267. Indeed, even if §959 applied extraterritorially to the possession crime, it also still would apply domestically to that crime, and it would remain redundant of §841’s domestic reach. There is therefore no way to eliminate the redundancy of the statutes, even if §959 also applies extraterritorially.

The government further cited the sentence regarding venue in the extraterritorial provision of §959 to support its argument, because it indicated that persons charged with violating §959 would be tried “at the point of entry.” *Id.* The Fifth and Second Circuits both relied on that language in holding §959 applied extraterritorially to the possession crime. *See Epskamp*, 832 F.3d at 163; *Lawrence*, 727 F.3d at 393. While the D.C. Circuit persuasively refuted that point, *see Thompson*, 921 F.3d at 267-68, it is no longer relevant. Congress repealed the venue provision in 2017, *see* n.4 *supra*, before Adamu was charged and convicted.

3. Ultimately, the court concluded it could not “discount plain congressional language as somehow inadvertent or mistaken.” *Id.* at 268. But even if the statute were ambiguous, it stated the rule of lenity would require it to resolve the ambiguity in the defendants’ favor. *See id.* The court concluded “the issue before us is not what congressional intent might lurk unexpressed in the statute, nor how a reasonable draftsman focusing on drug crimes in connection with airplanes...would have fashioned the section.” *Id.* Rather, it was the court’s duty to apply the presumption. *See id.* “Because §959 gives no clear indication of an extraterritorial application for possession with intent to distribute,” the court concluded “it has none.” *Id.*

C. The Second and Fifth Circuits Erred in Holding the Provision Applies Extraterritorially

1. Prior to the D.C. Circuit’s decision, the Second and Fifth Circuits each held §959 applied extraterritorially to possession with intent to distribute. Their decisions are wrong.

2. In *Epskamp*, the Second Circuit repeatedly stated the statutory language was ambiguous. It stated §959 was “an example of less than crystalline” and “inartful drafting” with “muddy textual waters” that involved “navigat[ing] [a] textual thicket.” 832 F.3d at 162-64. This language hardly bespeaks the “affirmativ[e] and unmistakabl[e]” instruction from Congress required to rebut the presumption against extraterritoriality. *RJR Nabisco*, 579 U.S. at 335. In fact, the court acknowledged the defendant’s argument the statute did not apply abroad was “not wholly without force.” *Epskamp*, 832 F.3d at 162.

Although it viewed the statute as ambiguous, the Second Circuit nonetheless proceeded to conclude it applied extraterritorially based on “the nature of §959 specifically, and the structure of federal statutory narcotics laws generally,” as well as the legislative history. *See id.* at 164-66. In so holding, the court engaged in the type of analysis this Court has rejected, attempting to “discern whether Congress would have wanted the statute to apply” extraterritorially. *Morrison*, 561 U.S. at 255. While “context can be consulted,” it is not for a court to “divin[e] what Congress would have wanted,” in the absence of a “clear indication of extraterritoriality.” *Id.* at 255, 266. The presumption controls in the face of competing interpretations, *Aramco*, 499 U.S. at 250,

especially in a criminal case where the rule of lenity applies—a rule the court did not consider in *Epskamp*.

3. In any event, as the D.C. Circuit held, the text *is* clear it does not apply extraterritorially to the possession crime, and the Second Circuit’s efforts to find ambiguity where none exists are not persuasive. As noted above, the Second Circuit, in part, grounded that ambiguity in the venue sentence of the extraterritorial provision, which Congress repealed in 2017 and is not at issue here. *See Epskamp*, 832 F.3d at 163. *Epskamp*’s rationale carries less weight here for that reason alone. It otherwise identified ambiguity in the statute’s use of “any,” asserting that, “[a]s other courts have observed, this particular formulation of the provision’s jurisdictional scope appears calibrated for broad extraterritorial application....” *Id.* At the same time, though, the court acknowledged that, “in the typical case, generic terms like ‘any’ or ‘every’ do not rebut the presumption against extraterritoriality.” *Id.* There is no reason why that general rule should not apply here.

4. The Fifth Circuit’s decision in *Lawrence* is equally unconvincing. To create ambiguity regarding the statute’s extraterritorial reach, the court likewise relied on the term “any” and the repealed venue provision, which are not persuasive for the reasons described above. *See* 727 F.3d at 392-93. Beyond that, the court engaged in the same speculative exercise of attempting to divine congressional intent from sources other than the statutory text, including the subchapter’s title, legislative history, and overall statutory framework—but again, with no mention of the rule of lenity to help sort out the criminal statute’s perceived ambiguity. *See id.* at 392-94.

The presumption exists precisely to avoid this complex judicial guesswork. “Rather than guess anew in each case, [the Court] appl[ies] the presumption in all cases, preserving a stable background against which Congress can legislate.” *Morrison*, 561 U.S. at 261. Against that background, Congress chose to include “distribution and manufacture” in the extraterritorial provision and omit “possession.” The function of the courts is to enforce that choice.

Only the “rare statute” can be held to “clearly evidence[] extraterritorial effect despite lacking an express statement of extraterritoriality.” *RJR Nabisco*, 579 U.S. at 340. Whatever subtle inferences about extraterritoriality can be drawn from the subchapter’s title, other drug laws, the statutory framework and the legislative history, they do not amount to an “affirmativ[e] and unmistakabl[e]” congressional instruction. *Id.* at 335. The statute does not apply extraterritorially.

D. This Case Presents an Appropriate Vehicle to Resolve the Circuit Split on an Important Issue

This case presents an appropriate vehicle, lacking any impediments, to resolve a pure question of law regarding an important issue. Because Adamu’s alleged conduct took place abroad, this petition turns entirely on step one of the *RJR Nabisco* framework. There is no need to proceed to step two to determine whether his conviction for the possession conspiracy stands; if the Court holds the crime does not apply extraterritorially, it cannot stand. *See Abitron*, 600 U.S. at 419.

As Adamu also was convicted of distribution conspiracy under the same count at trial, for his entire conviction to be overturned, he must demonstrate his wrongful conviction for the possession crime was not harmless. *See Thompson*, 921 F.3d at 269. The Second Circuit did not address harmlessness. Thus, pursuant to this Court's usual practice, it may decide the pure legal question before it—whether §959(c)(2)'s extraterritorial application here was erroneous—and remand to the Second Circuit for consideration of harmless error. *See Neder v. United States*, 527 U.S. 1, 25 (1999). Accordingly, on this petition, the Court may focus solely on the legal question, if it chooses to do so.

However, should this Court consider harmlessness, Adamu submits the error was not harmless. The primary evidence connecting Adamu to the alleged conspiracy was his mere presence on a flight with cocaine hidden on it. That evidence, if credited, supports a conspiracy of *possession* with intent to distribute, and it is not nearly as strong to support the distribution charge. The jury could have easily convicted the defendant of the possession charge, but not the distribution charge; but it is impossible to know, because they were charged in a single count. Therefore, the error here is not harmless, and Adamu's conviction must be reversed.

The issue presented here needs resolution. This Court has repeatedly emphasized the presumption against extraterritoriality is a long-standing and important canon of statutory interpretation. The circuits, however, continue to disagree over the mechanisms for determining whether a statute applies extraterritorially and, in particular, the need to focus on the plain text, as compared to other sources.

This statute is regularly charged related to foreign conduct, so this jurisdictional question will recur in future cases, except in the D.C. Circuit where there presently is no jurisdiction to prosecute possession with intent to distribute occurring abroad. This issue therefore is likely to be litigated repeatedly until it is resolved. This Court should settle the issue now, to conserve judicial resources. It will avoid prosecutions for which there is no jurisdiction under the law, and the concomitant resources necessary to resolve jurisdictional challenges to those charges in circuits where this question remains.

II. The Second Circuit's Decision That the Extraction Reports Do Not Contain Testimonial Hearsay Is an Outlier Among the Lower Courts

This Court should clarify that its holding in *Smith* specifically extends to testimonial hearsay in cellphone extraction reports. The Second Circuit's holding here is an outlier among the lower courts. Other courts have held, where an extraction report contains only raw data from a phone or computer, it does not contain hearsay. However, where, like here, the report reflects human input, it does contain testimonial hearsay subject to the Confrontation Clause. The Second Circuit's contrary decision injects uncertainty into the law and confuses the circumstances under which an analyst must be subject to cross-examination regarding an extraction report. There is a need for clarity from this Court, given the prevalent use of such evidence in criminal trials. Defendants have the right to cross-examine analysts who prepare extraction reports for use at trial containing their out-of-court statements about the extraction process.

Here, the government violated the Confrontation Clause when it introduced the Extraction Reports through SDNY analyst Santos, rather than CNP examiner Bakmaz, because (1) the reports were testimonial and (2) they contained Bakmaz's hearsay. That violation was not harmless beyond a reasonable doubt. This Court should grant the petition and reverse.

A. Under *Smith*, the Extraction Reports Are Subject to the Confrontation Clause

1. In *Smith*, this Court clarified a Confrontation Clause violation based on the government's introduction of testimonial hearsay at trial has two components: (1) "[the] statement must be hearsay ('for the truth') and (2) "it must be testimonial." 602 U.S. at 800. With respect to the second prong, the Court reiterated it examines the statement's "primary purpose" to determine if it is testimonial, and in particular "how it relates to a future criminal proceeding." *Id.* However, *Smith* focused on the first prong. In that regard, the Court held: "When an expert conveys an absent analyst's statements in support of the expert's opinion, and the statements provide support only if true, then the statements come into evidence for their truth." *Id.* at 783. The Court concluded "that will generally be the case when an expert relays an absent lab analyst's statements as part of offering his opinion." *Id.* And, if those hearsay statements are also testimonial, the Confrontation Clause bars their admission. *Id.*

2. Taking *Smith*'s second prong first, there is no real dispute the Extraction Reports are testimonial. Santos testified such reports are created for law enforcement and prosecutorial purposes. (Tr.729, 731). The government

has not advanced any other purpose, and it therefore has waived any challenge to this prong. *See United States v. Farhane*, 77 F.4th 353, 126 n.4 (2d Cir. 2024). Thus, although the Second Circuit did not address it, this Court should hold this prong satisfied.

3. Regarding the first prong, the Extraction Reports contained Bakmaz’s statements about the extraction process, which the government offered for their truth through Santos. They are hearsay.

It is instructive to begin with *Smith*’s analysis of this prong. The Court started by emphasizing a defendant has the right to cross-examine an analyst about the *process* used to generate a report. 602 U.S. at 785-86. Summarizing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court stated it had “rejected the State’s claim that the results of so-called neutral, scientific testing” should not be subject to the Confrontation Clause. *Id.* at 785. The Court “again underscored that the Confrontation Clause commanded not reliability but one way of testing it—through cross-examination.” *Id.* And the Court thought that “method might have plenty to do in cases involving forensic analysis.” *Id.* “After all, lab tests are not uniquely immune from the risk of manipulation or mistake.” *Id.* “The defendant might have used cross-examination to probe what tests the analysts performed, whether those tests presented a risk of error, and whether the analysts had the right skill set to interpret their results.” *Id.* at 786. Likewise, in explaining *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Court reiterated the problem with “surrogate testimony” is the surrogate “could not convey what the certifying analyst knew or observed about the particular test and testing process

he employed.” *Id.* “Nor could that testimony expose any lapses or lies on the certifying analyst’s part....” *Id.*

The Court applied these principles in *Smith*. At issue were an analyst’s laboratory notes and reports documenting her conclusion certain substances were drugs; the analyst (Rast) who conducted the analysis did not testify. *Id.* at 790. Instead, the State called a different analyst (Longoni) with no connection to the case as an expert to provide an “independent opinion” on the testing. *Id.* At trial, Longoni relayed what was in Rast’s documents, including the specific methods she used. *Id.* at 791. He then offered his opinion the tested substances were narcotics, the same conclusions Rast had reached. *Id.* In concluding Rast’s statements were introduced for their truth, the Court stated “truth is everything when it comes to the kind of basis testimony presented here.” *Id.* at 795.

As the Court explained:

Longoni could opine that the tested substances were [narcotics] only because he accepted the truth of what Rast had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results. And likewise, the jury could credit Longoni’s opinions identifying the substances only because it too accepted the truth of what Rast reported about her lab work (as conveyed by Longoni). If Rast had lied about all those matters, Longoni’s expert opinion would have counted for nothing, and the jury would have been in no position to

convict. So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up its whole case. But the maker of those statements was not in the courtroom, and Smith could not ask her any questions.

Id. at 798.

In short, Longoni was Rast's "mouthpiece." *Id.* at 800. "He testified to the precautions (she said) she took, the standards (she said) she followed, the tests (she said) she performed, and the results (she said) she obtained." *Id.* "The State offered up that evidence so the jury would believe it—in other words, for its truth." *Id.*

4. Here, the district court relied on the same rationale rejected in *Smith*. It held Santos's testimony admissible because "the Government offered a witness with specialized knowledge concerning Cellebrite,...and that witness testified about his own observations concerning the Cellebrite extraction reports and conclusions that he could draw from those reports." (App.83a; *see* App.85a-86a). The defect in that reasoning is the same defect present in *Smith*. Santos's "own observations" and "conclusions" based on the Extraction Reports were useful only if Bakmaz's statements in the reports were true. In other words, Santos's observations and conclusions were "predicated on the truth of [Bakmaz's] factual statements." 602 U.S. at 798.

Santos accepted as true what Bakmaz reported he had done. Santos then relayed that *process* to jury, by repeating what he read. But if Bakmaz lied about

conducting that process, if he committed and covered up critical errors, if he manipulated or deleted data, or if he otherwise falsified the Extraction Reports, then Santos's observations and conclusions "counted for nothing." *Id.* The truth of Bakmaz's statements was "everything." *Id.* at 795. The government offered his statements for that purpose, and Adamu was entitled to cross-examine Bakmaz about his statements that "propped up" Santos's testimony. *Id.* at 798.

Bakmaz's hearsay statements are readily identifiable when reviewing Santos's testimony. Based solely on what he read in the reports, Santos relayed the process Bakmaz said he conducted for the three phones to the jury. Santos testified he read in the Extraction Reports (1) Bakmaz said he was the CNP examiner who conducted the extractions; (2) Bakmaz said he used the Cellebrite software for the extractions; (3) the date and time Bakmaz said he conducted the extractions; (4) the profile Bakmaz said he selected for each phone; (5) the type of cable Bakmaz said he used to conduct each extraction, (6) the different types of extractions (file system, logical, physical, or manual screenshots) Bakmaz said he selected for each phone; (7) Bakmaz said he redid the logical extraction for one phone, because the first excluded audio, and (8) the different categories of data Bakmaz said he categorized and included in the report. Moreover, the Extraction Reports in evidence reflected Bakmaz's notes on the extraction process, regarding the unavailability of email extraction for one phone, and notes on the time zones and inaccuracy of the IMEI numbers for two phones.

Bakmaz's out-of-court statements about the extraction process he performed—statements the government

offered for their truth and Santos testified were, in fact, “legitimate” or true—are hearsay. The reports reflect his written input and selections in Cellebrite, which are “statements” under Rule 801. *See* Fed. R. Evid. 801(a) (“statements” include person’s “written assertion” and non-verbal conduct if “person intended it as an assertion”). For instance, when Bakmaz typed his name into the report, that was his written assertion indicating he was the CNP examiner who conducted the extraction at issue. When he selected the phone profile in Cellebrite, that was his nonverbal assertion about the appropriate manufacturer and device information for this extraction. When he selected the cable type, that was his nonverbal assertion about the appropriate equipment to use. When he selected the extraction types in Cellebrite, that was his nonverbal assertion about the appropriate extractions to run for each phone. And, when he entered his extraction notes, he made written assertions about his observations related to the process.

Based on these hearsay statements, Santos offered his own conclusions that no data on the phones had been altered and the Extraction Reports reflected data captured on the phones’ forensic images, which he had not reviewed. Then, Santos presented “voluminous” evidence from the reports, including reading numerous text messages. Thus, as in *Smith*, Santos’s observations and conclusions were entirely predicated on Bakmaz’s underlying hearsay statements. But Bakmaz, “the maker of those statements[,] was not in the courtroom, and [Adamu] could not ask [him] any questions.” 602 U.S. at 798. By failing to call Bakmaz, the government denied Adamu the right to cross-examine him on various topics related to the extraction process, including his competency, bias and veracity. *Bullcoming*,

564 U.S. at 661-62. Under *Smith*, this denial violated the Confrontation Clause.

B. The Second Circuit’s Decision Is an Outlier Among the Lower Courts

1. In holding that the Extraction Reports did not contain hearsay, the Second Circuit concluded they contained “raw, machine created-data,” rather than “anything that can be characterized as an implicit or explicit declarative statement by the examiner.” App.19a. “That is because the Croatian examiner who is listed on the report did not actually write it.” *Id.* “Rather, the entire report was generated through an automated process within the Cellebrite program.” *Id.* at 22-23. Thus, the Second Circuit indicated this case presented the question left open in *Bullcoming*, namely, whether the government could introduce “machine-generated results” through surrogate testimony. *Id.* at 23. It concluded the government could do so, because the extraction reports “were not the statements of anyone.”⁵ This decision does not accord with the record evidence, and it is against the weight of the authority.

2. Other courts have considered whether computer-generated extraction reports contain “statements” of the analyst who generated the report versus raw phone data. They have analyzed that question by looking to whether the report contains “representations relating to past

5. The government raised this argument for the first time on appeal. Although the Second Circuit ruled on this basis, Adamu argued to the court it had waived this argument. Reply at 25. The Second Circuit did not address the waiver.

events and human actions not revealed in raw, machine-produced data.” *Bullcoming*, 564 U.S. at 660. In *Hill*, for instance, the Fifth Circuit concluded extraction-report excerpts that contained no such representations could be introduced through surrogate testimony. 63 F.4th at 358-59. More recently, the Kentucky Supreme Court made a similar ruling in the wake of *Smith*. In *Baldwin*, the court concluded the unreadable, encrypted data the analyst downloaded using Cellebrite did not include testimonial hearsay subject to the Confrontation Clause. *Baldwin*, 2025 Ky. LEXIS 212, at *30. Surveying the relevant federal and state case law, the court concluded the dividing line is whether an extraction report contains “some form of human input,” rather than just “raw, machine produced data from an extraction.” *Id.* at *30-39. The former is testimonial hearsay; the latter is not. *See id.*

Indeed, several courts have concluded that a non-testifying analyst’s input into an extraction report may qualify as testimonial hearsay. In *Arce*, the Fourth Circuit concluded that a hash value identifying likely child pornography in the report was a testimonial statement, because it was created using input from officers. 49 F.4th at 391-92. The court noted “characterizations of, or conclusions drawn from, the data are statements.” *Id.* at 392. In *Juhic*, the Eighth Circuit addressed whether computer-generated reports containing notations identifying potential child pornography in files remotely downloaded from a computer were testimonial hearsay. 954 F.3d at 1088-89. The court stated “[m]achine-generated records usually do not qualify as ‘statements’ for hearsay purposes but can become hearsay when developed with human input.” *Id.* at 1089. The court held the notations at issue were hearsay. *See id.* “While

the reports may have been computer-generated, human statements and determinations were used to classify the files as child pornography.” *Id.* “The human involvement in this otherwise automated process makes the notations hearsay.” *Id.* And, in *Hajbeh*, the Eastern District of Virginia concluded affidavits from non-testifying analysts explaining the extraction process presented testimonial hearsay. 565 F. Supp. 3d at 776-77. The court stated, “[d]istilled to its essence, *Melendez-Diaz* holds that admission of an incriminating report summarizing a law enforcement official’s forensic investigation without the opportunity to cross-examine the report’s author violates the Confrontation Clause.” *Id.* at 776. The court thus concluded, “reliance on those affidavits, without giving Defendant an opportunity to cross-examine...about the forensic process of extracting files from Defendant’s iPhones, would violate Defendant’s rights under the Confrontation Clause.” *Id.*⁶

3. To be clear, at issue here are not the phones’ forensic images created during the extraction process’s “acquisition phase.” Rather, at issue are the Extraction Reports Bakmaz created during the final “reporting phase.” Santos did not even review the forensic images, which contain the raw data; Santos only reviewed the reports. The question here is thus whether the introduction of Bakmaz’s Extraction Reports through Santos, which

6. See also, e.g., *United States v. Oliver*, 987 F.3d 794, 800 (8th Cir. 2021) (“We are not persuaded by the argument that the markings cannot constitute hearsay simply because they are computer-generated.”); *State v. Lester*, 387 N.C. 90, 102 (2025) (“While truly machine-generated data fall outside the Clause’s sweep, electronic evidence relaying testimonial human statements must meet the normal evidentiary and constitutional requirements.”).

include Bakmaz’s written and non-verbal assertions about the extraction process, violated the Confrontation Clause. Although portions of the reports included the phones’ electronic data, the Confrontation Clause applies to his statements in the reports, beyond that data. *See Bullcoming*, 564 U.S. at 660.

This case is therefore unlike *Hill* and *Baldwin*, which involved only raw data. Although the reports here were computer-generated, they reflected Bakmaz’s input—his written statements and his selections in Cellebrite. The reports therefore contained a myriad of “statements” about the extraction process. All of this was “meet for cross-examination.” *Id.* Adamu had the right to confront Bakmaz about the extraction process, as well as his proficiency in conducting that process, the care taken in handling the evidence, and his veracity.

The Second Circuit thus has not followed the dividing line articulated in other lower courts. Because the report was “computer-generated,” the court concluded Adamu had no right to confront the analyst who input his statements into that computer-generated report. This Court should step in to correct this error, before it permeates the lower courts.

C. This Case Presents the Ideal Vehicle for Addressing a Recurring and Important Issue

1. This Court’s intervention is needed post-*Smith* to clarify a non-testifying analyst’s statements about the extraction process reflected in an extraction report are hearsay. This is a recurring issue of national significance to the proper administration of criminal trials. Cellphone

data is frequently introduced as evidence in criminal trials. The government's routine use of surrogate testimony to introduce extraction reports thus presents the same troubling issue this Court identified in *Smith* with respect to lab reports. *See* 602 U.S. at 799. Namely, the government will be able to introduce any extraction report through any trained surrogate, insulating the non-testifying examiner from cross-examination about "what she did and how she did it and whether her results should be trusted." *Id.* In short, it permits the government "to end run all [the Court has] held the Confrontation Clause to require." *Id.* The Court should plug this constitutional loophole.

2. This case presents the ideal vehicle for this Court to address this issue. It arises on direct appeal on *de novo* review and free of any procedural constraints. Adamu timely objected and argued Santos's testimony violated the Confrontation Clause, preserving the issue. The Second Circuit, in turn, substantively addressed and decided Adamu's argument, and it is properly presented for this Court's review. Moreover, the legal question of whether the Extraction Reports contained hearsay is dispositive of Adamu's claim.

3. Although the Second Circuit held "any error in admitting [the Extraction Reports] would be harmless, because the contents of the phones constituted only a small fraction of the government's evidence of Landji and Adamu's involvement in the drug conspiracy," App.20a, the Second Circuit erred in that regard. "Harmless-error review looks...to the basis on which the jury *actually* rested its verdict." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). "If the government can show beyond a

reasonable doubt that the error complained of did not contribute to the verdict obtained,” then “the error is deemed harmless.” *Weaver v. Massachusetts*, 582 U.S. 286, 294 (2017); see *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (harmless-error factors).

4. The government’s case against Adamu was weak. Because the alleged cocaine was excluded from evidence, the government principally relied on Cardona-Cardona’s testimony—an international drug kingpin, murderer and perjurer, who testified against Adamu, an alleged pilot courier, to avoid a 20-year mandatory minimum sentence and Guidelines range of life.

To back up his testimony, the government primarily relied on the Extraction Report evidence. Accordingly, the Extraction Reports, including Adamu’s text messages, call logs, and photos/videos derived therefrom, were “material to [the] critical issue” at trial. *United States v. Becker*, 502 F.3d 122, 134 (2d Cir. 2007). And, “[f]ar from being merely cumulative,” the Extraction Reports were “of critical importance to the government’s case,” not only as direct evidence against Adamu, but also to “bolster[.]... otherwise uncorroborated statements” and to “help[] rebut the defense’s attempts to undermine [Cardona-Cardona’s] credibility.” *Id.* at 135. Santos testified for hours regarding the “voluminous” evidence he read in the reports, and the government admitted 140 exhibits derived therefrom. During its jury addresses, the government repeatedly highlighted this evidence as corroboration of Cardona-Cardona. Such extensive reliance demonstrates the evidence’s improper admission was not harmless. See *Garlick v. Lee*, 1 F.4th 122, 136 (2d Cir. 2021); *Becker*, 502 F.3d at 135-36.

As such, the improperly admitted Extraction Reports undoubtedly contributed to the verdict. But if there were any doubt, the jury's note during deliberations would erase it. The jury requested "all texts/WhatsApp between Adamu and Fofana or Landji," text messages derived from the Extraction Reports. The court directed it to that evidence. Shortly thereafter, the jury returned a guilty verdict. This note leaves no question the jury considered these text messages, which influenced the verdict. *See, e.g., Tardif v. City of N.Y.*, 991 F.3d 394, 415-17 (2d Cir. 2021).

In minimizing the importance of the Extraction Report evidence, the Second Circuit did not address that Santos spent hours detailing it, the government's extensive reliance on it during its jury addresses, or the note the jury sent requesting Adamu's text messages just before its verdict. Instead, the Second Circuit relied almost entirely on the district court's off-the-cuff, mid-trial statement it "view[ed] the [cellphone extraction] evidence as quite marginal in terms of its significance to the jury." (App.120a). The district court made this statement, however, before critical events bearing directly on the harmless-error analysis, *i.e.*, the government's summation and the jury's note. Moreover, the Second Circuit failed to distinguish between the evidence against Adamu and Landji, although the text messages were particularly important to the government's case against Adamu. Accordingly, that error was not harmless beyond a reasonable doubt.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT, FILED JULY 21, 2025**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 23-6561 (Lead), 23-6696 (Con)

UNITED STATES OF AMERICA,

Appellee,

v.

GODOFREDO LEANDRO GONZALEZ, LUIS
RAFAEL FEBRES MONASTERIO, MURVIN
REIGOUD MAIKEL, OMAR TORRES, MOSES
ROOPWAH, NEREDIO-JULIAN SUCRE, DAVID
CARDONA-CARDONA, ARGEMIRO ZAPATA-
CASTRO, SHERVINGTON LOVELL, STEVEN
ANTONIUS, YOUSOUF FOFANA,

Defendants,

JIBRIL ADAMU, JEAN-CLAUDE OKONGO
LANDJI,

Defendants-Appellants.

February 6, 2025, Argued
July 21, 2025, Decided

Appendix A

Appeal from the United States District Court for the Southern District of New York. No. 1:18-cr-601-9, Paul G. Gardephe, *Judge*.

Defendants-Appellants Jibril Adamu and Jean-Claude Okongo Landji appeal from a judgment of the United States District Court for the Southern District of New York (Gardephe, *J.*). They were convicted following a jury trial of conspiracy to distribute and to possess with the intent to distribute five kilograms or more of cocaine in violation of Title 21, U.S. Code, Sections 959(c), 959(d), and 963. On appeal, the Defendants contend that (1) the government lacked jurisdiction to prosecute under 21 U.S.C. § 959, (2) the government violated their Sixth Amendment right to counsel by improperly using privileged information at trial, and (3) the district court erred in permitting the government to introduce data extractions from their cell phones. For the reasons set forth, we **AFFIRM** the judgment of the district court.

Before: PARKER, BIANCO, and NARDINI, *Circuit Judges*.

BARRINGTON D. PARKER, *Circuit Judge*:

Defendants-Appellants Jibril Adamu and Jean-Claude Okongo Landji appeal from a judgement of the United States District Court for the Southern District of New York (Gardephe, *J.*). Following a jury trial, they were convicted on one count of conspiracy to distribute and to possess with the intent to distribute five or more kilograms of cocaine. *See* 21 U.S.C. §§ 959(c), 959(d), 963. They were each sentenced to 120 months' imprisonment and five years' supervised release.

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On appeal, the Appellants contend that (1) the government lacked jurisdiction to prosecute under 21 U.S.C. § 959, (2) the government violated the Sixth Amendment by improperly using information protected by the attorney-client privilege and (3) the district court erred in permitting the government to introduce data extracted from their cell phones. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

BACKGROUND

This case arises from a multi-year international narcotics trafficking conspiracy in which Landji and Adamu used a private aircraft to transport multiton shipments of cocaine from South America to Africa and Europe. Landji is a United States citizen who owned and operated an aviation charter business using a Gulfstream G2 jet, and Adamu was Landji's co-pilot in the operation that led to their ultimate arrest.

In 2016, Landji began planning a large-scale drug trafficking operation with his co-conspirator, David Cardona-Cardona ("Cardona"), a known cocaine trafficker. Cardona, who testified at trial pursuant to a cooperation agreement, introduced Landji to Adamu. Landji and Adamu undertook extensive preparations to conceal and facilitate their operation, which included retrofitting the G2, conducting test flights, scouting remote landing strips in Western Sahara, and communicating over secure messaging platforms.

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In May 2018, Landji met with three individuals: Cardona, Youssouf Fofana, one of Cardona's drug customers, and a confidential DEA informant known as "Rambo" who posed as a large-scale trafficker. During a series of meetings in Lomé, Togo, which were covertly recorded and admitted at trial, the conspirators discussed the logistics of the trafficking plans. The defendants planned to use the G2 to make "black flights" (i.e., flights with disabled transponders) to transport multi-ton cocaine shipments by co-mingling narcotics with legitimate cargo. Landji agreed to a one-kilogram test run to demonstrate the conspirators' capacity to move larger quantities of drugs.

In October 2018, the defendants finalized their plans for the test flight. They loaded the G2 with a kilogram of cocaine in Mali and flew it to Zagreb, Croatia. When they arrived, Croatian authorities arrested both defendants. Along with the cocaine, the agents seized the defendants' mobile phones, which contained messages, videos, and contacts relating to their involvement in the drug conspiracy. Following the arrests, Adamu made admissions to DEA agents in which he acknowledged, among other things, his relationship with Cardona and his awareness that Cardona had previously used aircraft for drug smuggling.

Both defendants were extradited to the United States in October 2019. During the extradition process, DEA agents accompanying the defendants took custody of two categories of materials: documents collected by Croatian police (the "Croatian Law Enforcement Materials") and a

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separate set of personal papers found in the defendants' luggage (the "Extradition Documents"). The Croatian Law Enforcement Materials were produced to defense counsel in December 2019. However, the Extradition Documents were not produced at that time because of what government agents described as an internal misunderstanding. *See United States v. Landji*, No. (S1) 18-CR-601 (PGG), 2021 U.S. Dist. LEXIS 222729, 2021 WL 5402288, at *18 (S.D.N.Y. Nov. 18, 2021). According to the lead prosecutor, the government "mistakenly believed" that the Extradition Documents were duplicative scans of documents contained within the Croatian Law Enforcement Materials, and, for this reason, did not review or turn them over with their initial production. *Id.* However, after Adamu's counsel inquired in January 2020 about additional materials seized in Croatia, the government discovered the oversight. At that point, realizing that the Extradition Documents might contain potentially privileged information, the lead prosecutor in charge instructed the investigative team not to review them and directed a paralegal outside the team to produce them to defense counsel, which occurred in January 2020.

In October 2020, both defendants moved for the return of the Extradition Documents contending that they contained privileged attorney-client communications such as handwritten notes and legal memoranda. Defendants did not submit sworn declarations in support of their motions. The government opposed the motions and submitted sworn statements from DEA agents and prosecutors affirming that none of the materials had been read, apart from incidental exposure during their seizure

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and scanning. The district court, finding the defendants had not demonstrated the documents were privileged, denied the motion.

The issue resurfaced in July 2021 when Landji’s counsel requested to inspect the original physical documents and discovered that some had not been included in the earlier production. One such document was a one-page memorandum from Landji’s Croatian attorney (“the Šušnjar Memorandum”), which defense counsel argued contained privileged information including an outline of the defendants’ legal strategy. At that point, both defendants renewed their motions for the return of the documents and sought a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), on the grounds that the government had seen and used privileged information. In support of the renewed motion, Landji submitted a declaration stating he had made handwritten notes on certain documents in preparation for discussions with his attorney. Adamu’s motion referred to a notebook containing some 100 pages of notes that allegedly were made in anticipation of meetings with counsel.

The district court held a *Kastigar* hearing in September and October 2021 and ultimately denied the motion. The government presented six witnesses—four DEA agents, a DEA analyst, and the lead prosecutor. The district court found that they each had credibly testified that they had neither read nor relied upon the Extradition Documents at any stage of the investigation or prosecution, and that none of the government’s investigatory steps or

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legal strategies were based on those Documents. The district court also determined that the only privileged document was the Šušnjar Memorandum, but that it had never been reviewed by the government. The district court further concluded that, even assuming some inadvertent exposure had occurred, it did not taint the government's case because it had been developed through independent sources such as proffers from a cooperating witness and third-party interviews. The district court also ruled, in the alternative, that any indirect or tangential awareness of privileged material would not rise to the level of a *Kastigar* violation.

At trial, the government introduced extensive evidence, including testimony from Croatian law enforcement, Cardona's testimony as a cooperating witness, covert recordings of the May 2018 meetings, electronic communications between the defendants and their co-conspirators, as well as photographs of the seized drugs. The jury convicted both defendants. This appeal followed.

On appeal, Defendants argue that (1) the government lacked jurisdiction to prosecute their offenses under 21 U.S.C. § 959, (2) the government violated their right to counsel by improperly using privileged information in its prosecution, and (3) the district court erred in permitting the government to introduce data extractions from the defendants' cell phones. For the reasons set forth below, we affirm the judgment of the district court.

*Appendix A***DISCUSSION****I. Jurisdiction**

Defendants first argue that the United States lacks jurisdiction because 21 U.S.C. § 959 does not criminalize extraterritorial acts of possession with intent to distribute—the offense for which defendants were convicted. *See* 21 U.S.C. § 959(c). But, as the district court correctly concluded, we have already held that 21 U.S.C. § 959 “appl[ies] extraterritorially in its entirety,” including to “acts of possession with intent to distribute.” *United States v. Epskamp*, 832 F.3d 154, 162-66 (2d Cir. 2016).

Defendants nevertheless contend that *Epskamp* was wrongly decided and ask that we revisit that decision. Relying on the D.C. Circuit’s decision in *United States v. Oral George Thompson*, they argue that because 21 U.S.C. § 959 gives no “clear indication” of an extraterritorial application for possession with intent to distribute, we must conclude that it has none. 921 F.3d 263, 268, 440 U.S. App. D.C. 299 (D.C. Cir. 2019). But *Epskamp* controls and we see no reason to disregard it for out-of-Circuit precedent. In any event, it is well settled that one panel of this Court cannot overrule a prior decision of another panel. *See, e.g., United States v. Peguero*, 34 F.4th 143, 158 (2d Cir. 2022). Accordingly, we conclude that the government had jurisdiction under § 959.

II. Right to Assistance of Counsel

Next, defendants contend that the prosecution violated the Sixth Amendment by improperly using

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privileged documents, and that the district court thus erred in denying their *Kastigar* motion. First, defendants argue that the district court erred in concluding that none of the Croatia Law Enforcement Documents were privileged and that only one of the Extradition Documents—the Šušnjar Memorandum—fell within the privilege. Second, defendants contest the district court’s factual determination that the government did not use the Memorandum in its prosecution. We reject both contentions and conclude that the district properly denied the *Kastigar* motions.

To establish a Sixth Amendment violation arising from an invasion of the attorney-client privilege, a defendant must prove (1) that privileged information was passed to the government or that the government intentionally invaded the attorney-client relationship, and (2) that he was prejudiced as a result. *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985). To satisfy this test, a defendant must first make a threshold showing that the information is privileged and that the government actually reviewed it. *United States v. Schwimmer*, 924 F.2d 443, 445 (2d Cir. 1991). If the defendant establishes that the government reviewed privileged information, it is not in all instances barred from using the information. However, the government must prove that the evidence it proposes to use is derived from a legitimate source “wholly independent” of the privileged information. *See Kastigar*, 406 U.S. at 460; *see also United States v. Nanni*, 59 F.3d 1425, 1432 (2d Cir. 1995). But even if the government used privileged information, a defendant is still required to show that the government’s conduct was “manifestly and avowedly corrupt” or that there was “prejudice to [the

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defendant's] case resulting from the intentional invasion of the attorney-client privilege." *Schwimmer*, 924 F.2d at 447.

A. Privileged Material

The District Court correctly concluded that none of the Extradition Documents except the Šušnjar Memorandum contained privileged information. These non-privileged documents are a combination of (1) court documents, highlighted, underlined, or otherwise marked by the defendants, (2) handwritten notes by defendants, and (3) emails. The district court determined that neither the court documents nor the notes were privileged because there was no "proof that [their contents] were discussed with a lawyer or intended to serve as an outline of what would be discussed with a lawyer." *See Landji*, 2021 U.S. Dist. LEXIS 222729, 2021 WL 5402288, at *17.

We agree. The Supreme Court has explained that because the privilege has the effect of withholding relevant information from the factfinder, "it applies only where necessary to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976). Accordingly, in *United States v. DeFonte*, we reasoned that "[a] rule that recognizes a privilege for **any** writing made with an eye toward legal representation would be too broad." 441 F.3d 92, 96 (2d Cir. 2006) (emphasis added). Instead, we look to whether the allegedly privileged information has actually been communicated to counsel. *Id.* at 95. This is because "there can be no violation of the [S]ixth [A]mendment without some communication of valuable information." *Ginsberg*, 758 F.2d at 833. So, while

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“delivery of the [notes to one’s attorney] is not necessary” for the privilege to attach, defendants had to demonstrate that the content of the notes was communicated by the client to the attorney. *DeFonte*, 441 F.3d at 96. The district court found that the defendants failed to make this showing. *See Landji*, 2021 U.S. Dist. LEXIS 222729, 2021 WL 5402288, at *17.

On appeal, the defendants challenge this finding and assert that they did in fact share the content of the Extradition Documents with their attorneys. But this determination is a factual one “that will not be reversed unless the district court’s finding is clearly erroneous.” *Schwimmer*, 924 F.2d at 446. Here, defendants point to no testimony or anything else in the record to support this argument. While the defendants claim that they notified their counsel of the *seizure* of the Extradition Documents, tellingly, they do not claim that they ever discussed the *content* of the documents with their attorneys. Thus, the district court correctly concluded that the notes did not fall within the attorney-client privilege.

B. Government Review of Documents

The parties concede that one document—the Šušnjar Memorandum—was privileged. The district court concluded that the government did not review the document. *See Landji*, 2021 U.S. Dist. LEXIS 222729, 2021 WL 5402288, at *23-25. The defendants challenge this factual determination, contending that because there were times that the prosecution team had access to the Extradition Documents, the government must

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have reviewed the Šušnjar Memorandum. This factual conclusion “will not be reversed unless [it] is clearly erroneous.” *Schwimmer*, 924 F.2d at 446.

We discern no error, clear or otherwise. The evidence presented during the *Kastigar* hearings included the testimony of six government witnesses, each of whom testified that they did not read the substance of the Extradition Documents. Further, the lead prosecutor testified that he warned a member of the investigative team not to review the Extradition Documents because they might contain privileged documents. *See Landji*, 2021 U.S. Dist. LEXIS 222729, 2021 WL 5402288, at *25. Based on this record, the district court concluded that the government did not invade the privilege. On appeal, the defendants offer no non-speculative reasons to disturb those findings and, consequently, we conclude that the district court committed no error.

C. Wholly Independent Sources

Even assuming *arguendo* that the government reviewed the Šušnjar Memorandum, we discern no error, clear or otherwise, in the district court’s determination that the government derived its evidence from independent sources. Where the government reviews privileged documents, “[t]he government must demonstrate that the evidence it uses to prosecute an individual was derived from legitimate, independent sources.” *Schwimmer*, 924 F.2d at 446 (citing *Kastigar*, 406 U.S. at 461-62).

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The government initially claimed, based on information from Croatian law enforcement that the G2's transponders had been turned off for at least part of the flight, that the test shipment was a "black flight." *Landji*, 2021 U.S. Dist. LEXIS 222729, 2021 WL 5402288, at *22. Prior to trial, however, the government dropped its black-flight theory. The government asserts that this change was solely based on information provided by Cardona, the government's cooperating witness, and Curtis Seal, the third occupant of the airplane. Defendants, on the other hand, assert that the change was based on information the government learned through its review of the Extradition Documents. Defendants contend that "the government articulated **no** independent justification for its decision to question witnesses about the black-flight theory." Adamu's Opening Br. at 47. In other words, defendants contend that even if the government dropped the black-flight theory because of information it learned from Cardona and Seal, the decision to question them on the theory was a result of the government's review of the Šušnjar Memorandum.

The record does not support this contention. It shows that Cardona was involved in coordinating the logistics of the G2 test shipment, that he had attempted black-flight drug shipments on prior occasions, and that he had discussed black flight shipments with the defendants. The record is also clear that "Curtis Seal was [] on the plane" when the arrests occurred. *Landji*, 2021 U.S. Dist. LEXIS 222729, 2021 WL 5402288, at *25. It was therefore obvious that the government would question these witnesses on its black-flight theory, irrespective of the contents of the Extradition Documents and the Šušnjar Memorandum.

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Accordingly, the district court did not err, let alone commit clear error.

D. Prejudice

Finally, we agree with the government that any potential error stemming from the district court's finding of no invasion, intentional or otherwise, of the attorney-client privilege in this case was harmless. To find an error harmless, "we must be able to conclude that the evidence would have been unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *United States v. James*, 712 F.3d 79, 99-100 (2d Cir. 2013) (quotation marks and citations omitted). When making that determination "we principally consider: (1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence." *United States v. McCallum*, 584 F.3d 471, 478 (2d Cir. 2009) (alteration and quotation marks omitted). Our Court has "repeatedly held that the strength of the government's case is the most critical factor in assessing whether error was harmless." *Id.*

Here, the government presented overwhelming direct evidence of the defendants' guilt. Both defendants were arrested in the act of flying cocaine into Croatia. At trial, Cardona testified in detail about the seized shipment, defendants' prior drug dealings, and their involvement in the conspiracy. The government's evidence also came

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from extensive video and audio recordings of meetings in which Landji discussed cocaine trafficking with Cardona, and which contained multiple references to Adamu's role in the conspiracy scheme, as well as intercepted calls and text messages between Cardona and Fofana in which they discussed Landji and Adamu's participation in the conspiracy. In light of this extensive evidence of guilt, the discrete question of whether the Šušnjar Memorandum, if reviewed by law enforcement agents, caused the government to question witnesses about its initial black-flight theory was inconsequential such that we "can conclude with fair assurance that the [challenged] evidence did not substantially influence the jury." *McCallum*, 584 F.3d at 478 (quotation marks omitted).

III. Cellebrite Cellphone Extractions

Next, defendants argue that the district court erred in admitting cell phone data extracted in Croatia, and further erred in admitting the testimony of analyst Enrique Santos, who interpreted the data and explained the process by which it was extracted. Defendants point out that the government did not call Ante Bakmaz, the Croatian technician who performed the extraction.

First, Landji argues that Santos's testimony could not properly authenticate the extracted data as required by Fed. R. Evid. 901 because he did not perform the extraction. Second, Defendants contend that admission of Santos' testimony violated the Confrontation Clause. *See* U.S. Const. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). We disagree.

*Appendix A***A. Authentication of Cellebrite Extraction**

Evidentiary rulings are generally reviewed for abuse of discretion. *See United States v. LaFlam*, 369 F.3d 153, 155 (2d Cir. 2004). Rule 901 provides that “[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). Rule 901 “does not erect a particularly high hurdle,” and that hurdle may be cleared by “circumstantial evidence.” *United States v. Dhinsa*, 243 F.3d 635, 658-59 (2d Cir. 2001). Further, the proponent is not required “to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.” *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999). Rule 901 is satisfied “if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.” *Id.* Indeed, a document may be authenticated by distinctive characteristics of the document itself, such as its “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.” Fed R. Evid. 901(b) (4); *see also United States v. Maldonado-Rivera*, 922 F.2d 934, 957 (2d Cir. 1990). Finally, as we explained in *SCS Communications, Inc. v. The Herrick Co.*, 360 F.3d 329, 344-45 (2d Cir. 2004), the opposing party remains free to challenge the reliability of the evidence, to minimize its importance, or to argue alternative interpretations of its meaning, but these and similar other challenges go to the weight, not the admissibility, of the evidence.

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The government proved that the cell phones were owned by the defendants: indeed, they admitted ownership. At trial, the government introduced evidence from WhatsApp messages involving Landji, Adamu, and Fofana that included profile photographs, account usernames, and phone numbers associated with these messages. Santos also testified that the International Mobile Equipment Identity (IMEI) numbers, a unique numeric identifier found on cellphones, linked to the defendants' cell phones and matched the IMEI numbers found on the extraction report. Finally, Santos testified that the size of the forensic images of the physical cellphones matched the size of the data contained in the extraction reports, which provided additional confirmation that the data in the reports came from the defendants' cell phones. *See* App'x 1189-90. This testimony was enough to satisfy Rule 901.

Landji's arguments against admissibility are unpersuasive. First, he urges that Santos could not properly authenticate the cellphone extractions because Santos was not a "witness with knowledge" within the meaning of Rule 901(b), as he was not present when the Cellebrite data was extracted and could not testify as to its chain of custody. But "[b]reaks in the chain of custody do not bear upon the admissibility of evidence, only the weight of the evidence." *United States v. Morrison*, 153 F.3d 34, 57 (2d Cir. 1998).

Next, Landji contends that Santos' testimony "did not account for non-manipulation-related defects in the data such as machine error, software glitches, operator error, and/or omission." Landji Opening Br. at 50. Though these

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arguments may be fertile ground for cross-examination, they too bear on the weight of the evidence, not its admissibility. *See SCS Commc'ns, Inc.*, 360 F.3d at 344-45 (noting that challenges to reliability of evidence go to the weight of the evidence). For these reasons, we conclude that the district court correctly determined that the reports were sufficiently authenticated under Rule 901.

B. Confrontation Clause

Defendants also argue that the admission of the cell phone extractions violated the Sixth Amendment's Confrontation Clause. Specifically, they contend that, under the Clause, they were entitled to cross-examine the Croatian technician who conducted the extractions. In support of this contention, they primarily rely on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), both of which involved efforts to substitute certification or affidavits for live testimony regarding the results of a laboratory or forensic examination. We review *de novo* evidentiary rulings that allege violations of the Confrontation Clause. *United States v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006).

The Confrontation Clause bars admission of "testimonial statements" in a criminal case where the defendant does not have the opportunity to cross-examine the author of those statements. *See Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In *Smith v. Arizona*, the Supreme Court

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explained that “[t]o implicate the Confrontation Clause, a statement must be hearsay (‘for the truth’) and it must be testimonial—and those two issues are separate from each other.” 602 U.S. 779, 800, 144 S. Ct. 1785, 219 L. Ed. 2d 420 (2024). *Smith* dealt exclusively with the first point: whether a non-testifying drug lab analyst’s report, which was relied upon by a testifying lab analyst, was submitted for the truth. However, the Supreme Court expressly declined to resolve what makes a statement “testimonial.” *Id.* at 801.

We need not opine on what makes a statement testimonial because the cellphone extraction reports were not “statements” in the first place. Rather, they are raw, machine-created data. Unlike the certifications or affidavits in *Melendez-Diaz* and *Bullcoming*, the Cellebrite extraction reports do not contain attestations or certifications by the Croatian analyst who ran the Cellebrite program because they do not contain anything that can be characterized as an implicit or explicit declarative statement by the examiner. That is because the Croatian examiner who is listed on the report did not actually write it. Rather, the entire report was generated through an automated process within the Cellebrite program. *See* App’x 1334-41. We conclude that because the raw cellphone extraction reports contained “only machine-generated results,” they were not the statements of anyone. *Bullcoming*, 564 U.S. at 673 (Sotomayor, J., concurring in part).

But even if the cellphone extractions were admitted in error, “a reviewing court might nonetheless say that the

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error was harmless beyond a reasonable doubt.” *Vitale*, 459 F.3d at 195 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). We agree with the district court that any error in admitting this evidence would be harmless, because the contents of the phones constituted only a small fraction of the government’s evidence of Landji and Adamu’s involvement in the drug conspiracy.

We have been clear that “[t]he strength of the prosecution’s case . . . is probably the single most critical factor” in harmless-error analysis. *United States v Lee*, 549 F.3d 84, 90 (2d Cir. 2008) (internal quotation marks and citation omitted). The district court concluded here that it “view[ed] the [cellphone extraction] evidence as quite marginal in terms of its significance to the jury,” and “believe[d] the case [would] turn on the jury’s estimate of Mr. Cardona’s credibility.” App’x 1332. We agree. Although the cellphone extraction evidence was relevant, it consisted largely of coded discussions that did not explicitly refer to criminal activity, and the incriminating photographs and videos of airstrips and the airplane were cumulative of Cardona’s testimony.

By contrast, the prosecution brought forth a great deal of other evidence that both corroborated Cardona’s testimony and directly proved the defendants’ guilt. This evidence included extensive undercover recordings of Landji’s meetings with Cardona and Rambo, during which Landji participated in planning both his and Adamu’s participation in the conspiracy. It also included recordings of calls between Cardona and Fofana in which

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they acknowledged Landji and Adamu's plan to bring the test shipment of cocaine onto their G2. The jury also heard testimony that Adamu admitted, after his arrest, that he knew Cardona and was aware that Cardona used planes to engage in drug smuggling. *See United States v. Jean-Claude*, No. (S1) 18-CR-601 (PGG), 2022 U.S. Dist. LEXIS 113679, 2022 WL 2334509, at *8 (S.D.N.Y. June 27, 2022). Finally, there was evidence that Croatian law enforcement officers recovered cocaine from the G2. Therefore, when compared to the extensive evidence already supporting the jury's verdict, we conclude that the admission of the additional materials obtained from the cellphones, even if erroneous, did not substantially influence the jury's guilty verdict.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

**APPENDIX B — MEMORANDUM OPINION &
ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW
YORK, FILED JUNE 27, 2022**

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

(SI) 18 Cr. 601 (PGG)

UNITED STATES OF AMERICA,

-against-

JEAN-CLAUDE OKONGO LANDJI and JIBRIL
ADAMU,

Defendants.

June 27, 2022, Decided
June 27, 2022, Filed

MEMORANDUM OPINION & ORDER

PAUL G. GARDEPHE, U.S.D.J.:

Defendants Jean-Claude Okongo Landji and Jibril Adamu are charged with conspiring to distribute and possess with intent to distribute five kilograms and more of cocaine on board a U.S.-registered or U.S.-owned aircraft, or by a U.S. citizen on board any aircraft, in violation of 21 U.S.C. §§ 959(c), 959(d), and 963. ((S1) Indictment (Dkt. No. 39)) Landji and Adamu proceeded to trial on October 6, 2021. (Oct. 6, 2021 Minute Entry)

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On October 25, 2021, the jury returned a verdict finding both Defendants guilty. (Verdict (Dkt. No. 605); Trial Tr. (“Tr.”) 1183-86)¹

Landji and Adamu have moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, or alternatively for a new trial under Rule 33. (Did. Nos. 638-39) Landji and Adamu argue that (1) the evidence is insufficient; (2) this Court erred in permitting the Government to introduce extractions from their cell phones; and (3) the venire and petit jury did not reflect a fair cross-section of the community. (Landji Br. (Dkt. No. 638) at 33-40, 42-44, 46-49; Adamu Br. (Dkt. No. 639) at 3-14) Landji also argues that (1) the jury was prejudiced by references to the presence of cocaine that was not admitted at trial; and (2) the conditions of confinement during trial deprived him of a meaningful opportunity to participate in his defense. (Landji Br. (Dkt. No. 638) at 40-42, 44-45)

For the reasons stated below, Landji’s and Adamu’s motions will be denied.

1. Citations to page numbers of docketed material correspond to the pagination generated by this District’s Electronic Case Files (“ECF”) system. Citations to the trial transcript correspond to the pagination generated by the court reporter. Unless otherwise noted, references to “Tr.” are to the trial transcript. (*See* Dkt. Nos. 606, 608, 612, 614, 616, 618, 620, 622, 624, 626, 628, 630) All references to “Voir Dire Tr.” are to the separately paginated transcript of the *voir dire*.

*Appendix B***BACKGROUND****I. EVIDENCE AT TRIAL****A. The Government's Evidence**

The Government called six witnesses at trial, including co-defendant and Government cooperator David Cardona-Cardona. The Government's proof also included video and audio recordings of the Defendants, text messages authored by the Defendants, stipulations as to certain facts, and other documentary evidence.

1. Cardona-Cardona's 2009 and 2010 Contacts with Landji and Adamu

In 2009 and 2010, Cardona-Cardona — an international drug trafficker and arms dealer — schemed with Landji and Adamu to transport cocaine from South America to West Africa.²

Landji met Cardona-Cardona in 2009 through a mutual acquaintance “Loco Lucho,” with whom Cardona-Cardona had trafficked cocaine. (Tr. 286-87, 331) At their first meeting, Cardona-Cardona, Landji, Lucho, and

2. Evidence concerning conduct that took place prior to October 2017 was received subject to a limiting instruction. The jury was instructed that conduct “prior to the October 2017 to October 2018 time period alleged in the indictment” could only be considered “for the purpose of deciding whether the defendant had the state of mind, knowledge, and intent necessary to commit the crime charged in the indictment.” (Tr. 1155)

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others discussed a plan to transport two tons of cocaine using a Gulfstream III — a plane typically used for charter or business flights. (Tr. 287-88) Cardona-Cardona gave Landji money to lease the Gulfstream III through Landji's aviation charter company, Okland Aviation. (Tr. 289, 405; GX 502W) The conspirators agreed that Landji — a pilot and a U.S. citizen — would fly the Gulfstream III from the United States to Conakry, Guinea in West Africa, and then on to Venezuela, where he would to pick up the cocaine, and then return to Conakry with the drugs. (Tr. 90, 289-90, 329; GX 1000) A military officer who controlled the airport in Conakry was paid a \$50,000 bribe to ensure that the drugs would be secure upon arrival. (Tr. 330-31) In addition, because Landji had not been authorized to fly into Venezuela airspace, he planned to land at a Caribbean island close to Venezuela and await clearance from Venezuelan officials. These Venezuelan officials — who had likewise been bribed — would inform Landji when he could fly to Venezuela to pick up the cocaine. (Tr. 290, 327-34, 570-71)

The scheme did not proceed as planned. After Landji landed at the Caribbean island, he did not receive the necessary authorization to enter Venezuela. (Tr. 332-34) To placate officials at the airport — who were suspicious as to his reasons for being there — Landji falsely reported that the plane had technical issues. (*See* Tr. 332-34, 571) Landji eventually returned to West Africa without picking up the cocaine in Venezuela. (Tr. 333, 572)

A few months later, Cardona-Cardona, Landji, and Lucho attempted to transport 2.5 tons of cocaine from

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Venezuela to West Africa using the Gulfstream III. (Tr. 334, 336) Landji was responsible for arranging for the plane to be picked up in the United States, resolving issues with the pilots' expired licenses, and preparing the flight plan. (Tr. 334-35, 344-45) Cardona-Cardona and Landji agreed that the plane would be officially registered to fly from Mali to Conakry. Instead of landing in Conakry, the plane would fly on to Venezuela to pick up the cocaine, and would then return to Conakry. (Tr. 335-39, 343-46; GX 238) This flight would be a "black flight" that is, an undeclared flight in which no flight plan is filed and the plane's transponders and GPS location systems are disabled so that the plane cannot be detected. (Tr. 275-76, 335-36, 458) Cardona-Cardona bribed officials in Conakry to ensure that the drugs would be secure upon arrival. (Tr. 336-38) Although the plane arrived in Mali, the remainder of the operation had to be cancelled because the plane's batteries were overheating. (Tr. 343-44, 347) Despite these failed operations, Cardona-Cardona and Landji "agreed not to lose touch." (Tr. 348)

In or around 2010, Adamu — who is also a pilot — was introduced to Cardona-Cardona by "Jimmie," a mutual friend. Jimmie was one of Cardona-Cardona's cocaine customers. (Tr. 271-72, 355) Cardona-Cardona and Adamu discussed purchasing a King Air 350 or a Cessna Conquest II that would be used to transport cocaine from South America to Conakry in West Africa. (Tr. 271-75, 354, 708) Cardona-Cardona and Adamu estimated that, depending on which plane they purchased, they could transport between 800 kilos and one ton of cocaine at a time. (Tr. 275) Adamu agreed to fly the plane on black flights. (Tr. 275-

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76) Cardona-Cardona and Adamu also discussed bribing officials at airports and using makeshift landing strips to avoid detection by authorities. (Tr. 276-77) Ultimately, Cardona-Cardona and Adamu did not purchase either plane. (Tr. 277)

That same year, Cardona-Cardona and Adamu — and Cardona-Cardona’s friend Juan Carlos — began planning a separate narcotics trafficking operation. (Tr. 277-78) As part of that operation, Adamu was to be paid to fly a Boeing 727—“a large-capacity cargo plane” — from Senegal to Panama. (Tr. 278-79, 709) The plan was for Adamu to transport a large quantity of cocaine from Panama to West Africa. (*See* Tr. 278-79, 354) After Adamu arrived in Panama, the Colombian drug traffickers who held the cocaine decided to use a different pilot, and Adamu returned to West Africa. (Tr. 278-79) The Boeing 727 airplane Adamu had flown to Panama was loaded with five tons of cocaine and flown to West Africa. The plane crashed in Mali, however, as a result of a sandstorm. (Tr. 279-80) After Adamu returned to Africa, Adamu and Cardona-Cardona discussed Adamu’s compensation for his participation in the operation, and Cardona-Cardona informed Adamu that the plane had crashed in Mali with the cocaine, an event that was reported internationally. (*Id.*)

2. Cardona-Cardona’s 2016-17 Contacts with Landji and Adamu

In 2016, Landji purchased a Gulfstream II airplane. Although Landji purchased the plane in Portugal, it was

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registered in the United States. (Tr. 261-62, 348, 350; GX 214, 1000) While Landji was in Europe, he contacted Cardona-Cardona to discuss using the plane to traffic cocaine. (Tr. 261-62, 348) A few months later, Landji and Cardona-Cardona met in Lomé, Togo and discussed using the plane to transport two tons of cocaine from South America to West Africa. (Tr. 348-49) Cardona-Cardona told Landji that he needed a “trusted pilot” to transport the drugs, and suggested Adamu. (Tr. 349-50, 353-54) Landji and Cardona-Cardona discussed the training Adamu would have to receive in order to pilot the Gulfstream II, as well as the maintenance required for the plane. (Tr. 350) Landji and Cardona-Cardona also discussed changing the plane’s U.S. registration. Cardona-Cardona expressed concern that using a U.S.-registered plane to transport illegal drugs would subject them to criminal liability under U.S. law. (Tr. 350-51) Cardona-Cardona gave Landji \$350,000 to cover the cost of changing the plane’s registration and performing required maintenance on the plane. (Tr. 351-52) Cardona-Cardona and Landji also purchased new phones so that they could communicate about the operation without detection. (Tr. 352-53)

A few months later — in late 2016 or early 2017 — Cardona-Cardona met with Adamu and Jimmie in Lomé to discuss the operation. (Tr. 353-55) Cardona-Cardona told Adamu that Landji “had proved himself to be courageous” in their prior drug trafficking operations. (Tr. 355-56) Cardona-Cardona and Adamu agreed that Adamu’s role in the new operation would be to fly a plane carrying cocaine from South America to West Africa. (Tr. 356-57) Adamu requested that he be paid \$250,000 per flight. (Tr. 357-58)

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The next day, Cardona-Cardona met separately with Landji in Lomé. (Tr. 35859) Landji told Cardona-Cardona that he wanted to be paid \$1,000 per kilogram of cocaine, and that he wanted to “be in charge of everything,” including the plane’s crew and expenses. (Tr. 359)

Cardona-Cardona then introduced Landji to Adamu, and the three men discussed the logistics of the operation — including how much cocaine would be transported (two tons per shipment) and under what circumstances black flights would be utilized. (Tr. 359-63) Cardona-Cardona, Landji, and Adamu agreed that the plane would transport cocaine from South America to the Western Sahara, either Sierra Leone or Conakry. (Tr. 360-61; *see also* Tr. 249-50)

3. Landji and Adamu Prepare for the 2018 Operation

Over the next few months, Landji and Adamu began preparing for the transport of cocaine from South America to West Africa. Adamu was responsible for overseeing the maintenance of the Gulfstream II, then in Mali. (Tr. 260, 373-74) In September 2017, Landji travelled to the Western Sahara to inspect various landing strips to determine whether they would be suitable for the operation. (*See* Tr. 363, 368, 841-42, 847-52; GX 502Q1, 502X1) Landji used his phone to take photos and videos of the landing strips and considered whether they were large enough to accommodate the Gulfstream II, and whether the desert dust at these locations would interfere with the functioning of the plane. (*See* Tr. 364-66, 368-73, 841-42, 847-52; GX 502Q, 502X, 502Y) Landji reported to Cardona-Cardona

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that he felt “confident” about the landing strips he visited, because these sites were kept secure by a local military officer with close ties to Cardona-Cardona’s friends, Richard and Gordo. (Tr. 251-52, 361-63, 369-73)

Landji and Adamu were in frequent contact at this time, including through phone calls and text messages over the Whatsapp platform. (*See, e.g.*, GX 501S, 501T, 501U1, 501U2, 501113) Landji and Adamu discussed the progress of the operation, and Landji helped coordinate Adamu’s training to become certified to fly the Gulfstream II. In March 2018, for example, Adamu sent Landji a Whatsapp message stating: “They are ready for us and the aircraft” when “we finish training.” Adamu also stated that, “[o]nce you conclude[,] I sure he is ready to deal.” (GX 501U1; *see also* Tr. 350, 385-86, 409-10, 807, 827; GX 501Z1-T) Landji and Adamu also discussed the status of the operation with Youssouf Fofana, one of Cardona-Cardona’s cocaine customers who acted as an intermediary between Landji and Adamu on the one hand, and Cardona-Cardona on the other. (Tr. 252-54, 374; *see also* Tr. 261-62)

In May 2018, Cardona-Cardona contacted Landji over Whatsapp to discuss a “big opportunity” to increase the scale of their planned operation. (Tr. 384-92; GX 501Z1-T, 501Z2-T, 501Z3-T, 501Z4-T) At that time, Cardona-Cardona was in communication with an individual he knew as “Rambo.” Rambo posed as a large-scale drug trafficker who was interested in purchasing planes that could be used to transport drugs. In reality, Rambo was a Drug Enforcement Administration (“DEA”) informant. (Tr. 250, 389-90, 397-99) Using coded language, Cardona-

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Cardona instructed Landji to meet him in Lomé, where Cardona-Cardona would “explain everything.” (Tr. 388-89; GX 501Z1-T, 501Z2-T) Landji told Cardona-Cardona, “I’m ready for everything” (GX 501Z3-T), and Cardona-Cardona told Landji that he would “have a business like never” (GX 501Z4-T).

4. May 2018 Meetings in Lomé

A few days after Cardona-Cardona and Landji exchanged these text messages, Landji travelled to Lomé to meet with Cardona-Cardona. (Tr. 392) Landji, Cardona-Cardona, and Fofana met outside of a hotel where Rambo was staying, and Cardona-Cardona briefly explained that they were going to meet Rambo to discuss Rambo’s investment in their operation. (Tr. 392-95; GX 208) Landji, Cardona-Cardona, and Fofana then went to the lobby area of the hotel, where Rambo joined them. (Tr. 395-96) Over the next two days, the four men discussed the logistics of the scaled-up operation. (Tr. 396-97)

During these meetings — which Rambo secretly recorded — the men discussed purchasing cargo and charter planes that would be used to transport large quantities of cocaine under the “cover of a legal enterprise” — Landji’s company, Okland Aviation. (Tr. 396-98; GX 301A, 30311; *see also* Tr. 491-92; GX 304D (“[T]he idea is to make a fusion of the real business with the illegal business.”)) Rambo proposed that they transport drugs through the company’s planes “twice a month” and conduct legal business “the rest of the time.” (GX 304D) Alternatively, he proposed mixing legitimate

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cargo — such as mangoes, bananas, or fish — with “our cargo” — *i.e.*, narcotics — in order to avoid detection. (Tr. 492; GX 301D, 304D) Landji responded “Yeah” and “[t]his will be a good time” to Rambo’s proposals, indicating his agreement to the scheme. (Tr. 443-46, 492-93; GX 304D, 302E; *see also* GX 303M) Landji told the others that he had two pilots at Okland Aviation “who are there solely for what we do” — that is, drug trafficking. (Fr. 471-75; GX 303Q-T, 303S-T) Landji identified Adamu as one of the pilots who did the “dirty work.” (Tr. 473-75; GX 303Q-T, 303S-T)

The four men discussed how they would avoid law enforcement detection, including by using black flights, secret landing strips, and bribes to airport officials. As to black flights, Landji explained which devices onboard an aircraft would have to be disabled in order to fly undetected to Africa with drugs. (Tr. 470-71; GX 303P; *see also* Tr. 463-66; GX 303L, 303M) Landji said that the King Air 350 airplane would be suitable for black flights, and that he had been seeking to purchase that plane in South Africa. (Tr. 464-65; GX 303L; *see also* GX 501CC, 501EE)

Landji also described the secret landing strips in remote desert locations that would be used to unload the narcotics shipments. Landji stated that the pilots could “leave the lights off” on the plane, unload the plane in “five . . . or ten minutes,” and then “boom, boom, boom” take off with an empty plane. (Tr. 475-77; GX 303T) Landji also agreed that airport officials in Africa would be bribed to ensure that the narcotics remained safe when they were loaded and unloaded. (Tr. 401-04, 454-56; GX 303C) The

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four men discussed working with Landji's "friends" — a reference to a military officer and his associates who controlled the airport in Conakry, and whom Cardona-Cardona and Landji had bribed during a prior drug trafficking operation. (Tr. 330-31, 399-404; GX 301A) The drugs would be transported from West Africa to Europe. Odessa, Albania, and Montenegro were discussed as possible destinations, because Rambo represented that he had relationships with officials there. (Tr. 401; GX 301A, 302C, 302F, 303F, 303M)

Cardona-Cardona, Landji, Fofana, and Rambo also discussed the types of planes they would use for the drug shipments and the quantities of drugs those planes could carry. They discussed Landji's Gulfstream II, and the fact that it could transport as much as 2.5 tons of cocaine, depending on the distance the plane would be traveling. Landji told the others that they would "keep the seat[s]" in the plane, but load it up with "paper" — referring to cocaine. (Tr. 410-12; GX 301C; *see also* (IX 303D, 303S) They also discussed purchasing additional planes that could carry "bigger cargo." (Tr. 404-05; GX 301A; *see also* GX 303L) These larger planes included (1) the "Sukhoi Superjet," a "multipurpose" aircraft that could carry both passengers and cargo; (2) the "Ilyushin 76D," a cargo plane suitable for landing in the desert; and (3) the "Antonov 12," a cargo plane that has the ability to land in many types of terrain. (Tr. 479-85, 490-91; GX 304A, 304D; *see also* GX 210, 212, 213) The men also discussed the fact that the King Air 350 — which they agreed to use for black flights — would be able to transport as much as one ton of cocaine:

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Rambo: Once [the King Air 350] is loaded . . . once the planes is with the tanks, everything.

Cardona-Cardona: Uh-hum.

Rambo: It creates weight. It creates weight. So how much weight more from the dope.

Landji: One ton.

Rambo: How much can we put in?

Cardona-Cardona: One ton.

Rambo: So one ton plus the gas.

Cardona-Cardona: So one ton plus, plus the . . . fuel. One ton.

Rambo: Is strong plane.

(Tr. 486-90; GX 304C)

During the May 2018 Lomé meetings, Cardona-Cardona remarked that none of the planes they would use could be registered in the United States, because using a U.S.-registered plane would subject them to criminal liability under U.S. law:

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Cardona-Cardona: If you put one kilo on a plane that has the American registration, it's the same thing as putting it in . . . in the middle of . . . of . . . of Madi . . . Madison Square Garden in New York. The same thing. For the justice system.

Landji: Yes, yes.

(Tr. 460-62; GX 303J)

Landji agreed that they would have to change the Gulfstream II's registration in order to use it for drug shipments:

Cardona-Cardona: But we're going to change the registration.

Fofana: No, there's no way around that.

Landji: No way around it.

(Tr. 462-63; GX 303N-T; *see also* Tr. 469-70; GX 3030-T)

Landji also agreed that they would use the Gulfstream II to transport a small sample of drugs from Mali — where the Gulfstream II was maintained — to Montenegro, in order to show their European investors that they had the capacity to ship larger quantities of drugs:

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Cardona-Cardona: It is very, very, very important . . . and is very good, uh . . . in a few time, as soon possible. I think in two, three weeks send the plane there for, for . . . flight proof.

Landji: Uh-hum.

Cardona-Cardona: To show them that we has . . . that kind of capacity.

Landji: Yeah.

Rambo: Is to show them the line is open.

Cardona-Cardona: [overlapping voices] The line is open.

Landji: [overlapping voices] Yeah, the line is open.

(Tr. 452-53, 459-60; GX 303B, 303F; *see also* Tr. 457; GX 303E (Landji: “I will do it. I will take it. We go and do the testing.”))

During this portion of the discussion, Landji asked whether the plane would be flying “empty.” Rambo stated that the plane would carry a “small thing,” “[n]othing expensive” — a reference to a small sample of cocaine — to show the investors that “we’re ready for business.” Landji responded “Yeah, cool, no problem.” (Tr. 453-54; GX 303B) Landji later confirmed that he would transport a “kilo” of

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cocaine in the test shipment. (Tr. 463; GX 303L) Landji further agreed that, after completing the test shipment, they would begin transporting up to two tons of cocaine at least twice a month, or as frequently as every week. (*See* Tr. 451-52, 466-67, 492-93; GX 303B, 303M, 304D) Landji also confirmed that — after the narcotics shipments arrived in Europe — he would take responsibility for transporting the money paid for the cocaine — which could amount to as much as 40 million euros for a ton of cocaine — back to Africa. (Tr. 449-51; GX 303B)

The four men also agreed to purchase a new “Skype” or “PGP” phone for Landji that was specially encrypted; that Landji would use an encrypted messaging app called “Telegram”; and that they would use coded language when speaking with each other about cocaine — all in an effort to ensure that their scheme would not be discovered by law enforcement. (Tr. 485-86; 502-04; GX 304B, 305D-T; *see also* GX 501Z1-T)

5. Landji and Adamu Finalize the Plan for the Test Shipment

While the May 2018 meetings in Lomé were underway, Adamu was waiting to receive an update regarding the operation. On May 27, 2018 — the first day of the meetings-Adamu sent Landji a message asking what the “next plan” was. (GX 503R3) Landji responded, “standby []we are in a meeting pls,” to which Adamu responded “Ok. Standing by when you done.” (*Id.*) Adamu also sent Fofana a message, asking Fofana to call him back: “[I] have not heard from you and a[l]so jc [Jean-Claude] is not

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contact. so dont know his program.” (GX 503N4) Fofana was tasked with informing Adamu what his role would be in the operation. (Tr. 504-05)

On May 29, 2018 — after the Lomé meetings had concluded — Fofana contacted Adamu and said that he had a “programme” for Adamu, but that they had to meet. Adamu responded, “Oook ! Where and when?” (GX 503N4 (text message), 503N4 (voice note); Tr. 505, 507, 868; *see also* Tr. 517-18) That day, Landji messaged Adamu asking him “to come out to” “Cotonou,” to which Adamu responded, “ok.cool.” (GX 503U) Landji and Adamu exchanged dozens of calls over the next week. (*See* GX 503T)

In subsequent months, Landji continued to coordinate the trafficking operation with Fofana and Cardona-Cardona. In a June 6, 2018 text message to Landji, Fofana stated that “Where is hope . . . [f]or Monte Negro” (GX 501Y4-T) — referring to the test shipment of cocaine they planned to transport from Mali. In a June 10, 2018 text message to Cardona-Cardona — whose screen name on Whatsapp was “Antony Bah” (Tr. 383-84) — Landji stated that he would be speaking with their “friend,” and that Landji would “organize things.” (GX 501Z5-T; *see* Tr. 509-10)

In July 2018, Landji and Fofana exchanged a series of text messages regarding the whereabouts of Gordo — the drug trafficker with ties to a military officer who controlled a landing strip in the Western Sahara that Landji intended to use. Landji and Fofana discussed

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whether they would ask Gordo to invest \$50,000 in their operation. (GX 501Y7-T; *see* Tr. 252, 360-61, 370-71) Landji and Fofana also discussed paying a \$500,000 to \$1 million bribe to a military officer who was stationed at the Conakry airport. (GX 501Y8-T; *see also* Tr. 402-04)

Several months after the May 2018 Lomé meetings, Landji met with Cardona-Cardona and Fofana in Sierra Leone. (Tr. 511) Landji updated Cardona-Cardona on the progress of his preparations, and asked for more money to cover the maintenance of the Gulfstream II and to expedite the process to change its registration. (Tr. 511-13) Cardona-Cardona gave Landji \$300,000 to cover these expenses. (Tr. 512) Landji also inquired as to the status of their plan to purchase additional planes, and Cardona-Cardona explained that Rambo was “wait[ing] for us to do a gesture of good faith” — that is, a test shipment of cocaine — “before the planes could be bought.” (Tr. 513)

In October 2018, Landji and Adamu began their final preparations for the test shipment. Landji and Adamu — who were in Mali conducting last-minute inspections and adjustments to the plane (Tr. 514-15) — each remained in close contact with Fofana, exchanging dozens of calls with him in October 2018 alone. (*See* GX 5020 (Landji); 503L (Adamu); *see also* Tr. 810) Landji’s and Adamu’s Whatsapp communications with Fofana make clear that Fofana continued to be an intermediary between them and Cardona-Cardona throughout this period.

In an October 10, 2018 Whatsapp exchange, Fofana told Landji, “I am in position” and “I am waiting to meet

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with David [Cardona-Cardona].” Several hours later, Landji reported to Fofana that “it is all good. I spoke to our friend.” (GX 501Y10-T)

Fofana confirmed that Cardona-Cardona would meet Landji and Adamu when they landed with the test shipment. In an October 20, 2018 exchange, for example, Adamu asked Fofana “[i]s david coming back before we depart,” and Fofana responded “[y]ou will see him there . . . [a]t the appointment.” (GX 503N6)

At about this time, Cardona-Cardona informed Landji and Adamu (through Fofana) that Cardona-Cardona had changed the final destination of the test shipment from Montenegro to Zagreb, Croatia, in a farther effort to avoid detection. (*See* Tr. 519-20; GX 402-T) Cardona-Cardona then travelled to Zagreb to wait for Landji and Adamu to arrive with the one-kilogram test shipment. (Tr. 514) On October 18, 2018, Fofana reported to Landji that “David is there today.” (GX 501Y11-T)

During this time, Croatian law enforcement authorities intercepted a number of phone calls between Cardona-Cardona and Fofana. In October 21, 2018 telephone calls, Fofana told Cardona-Cardona that he was having trouble finding someone to transport a single “diamond stone” — coded language for the one-kilogram test shipment of cocaine because it was such a small quantity. (Tr. 517-22; GX 402-T, 403-T (“[F]inding a one-stone transporter is complicated. If it is a lot, it is quickly done.”)) Cardona-Cardona and Fofana also discussed the need to obtain new “papers” because the flight plan Landji had prepared

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listed Montenegro as the destination. (*See* Tr. 519-20; GX 402-T, at 3, 6; GX 403-T, at 6; GX 406-T, at 2-4) In an October 26, 2018 telephone call, Cardona-Cardona instructed Fofana to tell Landji that, after Landji landed in Zagreb, he was to “leave the stone in the car” — code language for leaving the one kilogram of cocaine in the plane — and that Cardona-Cardona would retrieve the cocaine from the plane later in the evening. (Tr. 523-24; GX 407-T, at 5)

In the days leading up to Landji’s and Adamu’s flight to Zagreb, Adamu and Fofana exchanged text messages regarding the status of the flight. On October 28, 2018, Fofana informed Adamu that they would have to “pay for the delay” and that there was a “problem,” and Adamu asked whether the “meeting” would be “cancelled.” (GX 503N6) Fofana stated that he was conferring with “David,” and asked whether Adamu could “move tomorrow.” (*Id.*) Adamu responded: “Yes. We are going for a test flight now.” (*Id.*)

On October 29, 2018, Adamu told Fofana that he was “[t]opping up oxygen” and “doing [a] flight plan,” and that he was “with jc” — referring to Landji. (*Id.*) Soon thereafter, Fofana messaged Adamu asking for an update (“Nell me something”), and Adamu responded with a photograph of him and Landji inspecting the plane. (*Id.*; GX 503N6C; *see also* GX 503W; Tr. 515-16) At about this time, Fofana told Cardona-Cardona that the one kilogram of cocaine had arrived in Mali and that — according to Adamu Landji had hidden the cocaine on the plane. (Tr. 525-28)

*Appendix B***6. The Arrest of Cardona-Cardona, Landji, and Adamu in Zagreb**

On October 29, 2018, Cardona-Cardona was arrested by Croatian authorities in Zagreb. (Tr. 86, 528) On the evening of October 30, 2018, Landji, Adamu, and a flight instructor took off from Mali on board the Gulfstream II and flew the plane — which contained the one-kilogram test shipment of cocaine — to Zagreb. (Tr. 87, 127-28, 515-16, 612) Shortly after landing, Landji and Adarnu identified themselves at passport control, and Croatian authorities arrested them. (Tr. 89) Croatian authorities then took Landji back to the plane and secured it. (Tr. 90-91, 93-98, 128-29; GX 601A1 to 601A13, 602A1 to 602A15) The following morning, members of Croatian law enforcement searched the Gulfstream II and recovered a white plastic bag with red and yellow markings in the plane's cargo area. (Tr. 95, 99, 141-47, 178-79; GX 102-03, 223-27, 241) Inside the white bag was a black bag, and inside the black bag was a rectangular-shaped package containing a white powdery substance “with characteristics of cocaine.” (Tr. 143-45, 179-85; GX 228-34) Croatian law enforcement weighed the rectangular package and determined that it weighed approximately one kilogram. (Tr. 143, 147; GX 234) The Croatian authorities also seized various electronic devices, including Landji's and Adamu's cell phones. (Tr. 139-41, 148; *see* GX 104-06)

Shortly after his arrest in Zagreb, Adarnu was questioned by DEA agents. (Tr. 706-07) During questioning, Adamu stated that he knew Cardona-Cardona and Fofana, and that Fofana had told Adamu

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that Cardona-Cardona was in Europe. (Tr. 707-08) Adamu also admitted that he knew that Cardona-Cardona was involved in drug trafficking, and that Cardona-Cardona used planes for drug trafficking. (Tr. 708-10) Adamu told the agents that he had previously worked with Cardona-Cardona, including by attempting to broker an airplane sale for Cardona-Cardona and by piloting flights for him. (Tr. 708-09) Adamu stated that he had been paid \$3,000 to pilot a Boeing 727 from West Africa to Panama, and that he was aware that that same aircraft later crash-landed in Mali while loaded with drugs. (*Id.*)

On October 17, 2019 — nearly a year after their arrest — Landji and Adamu were extradited from Croatia to the United States. (GX 1001)

B. The Defense Case

Landji and Adamu did not testify and did not call any witnesses.

Landji introduced a Gabon passport issued to him in 2015. (*See* DX A, S-A) The passport has a 2020 expiration date. Landji argued that the passport demonstrates that he did not travel to (1) Togo in 2016 or 2017 to meet with Cardona-Cardona; (2) the Western Sahara in September 2017 to research possible landing strips; or (3) Sierra Leone in 2018 to meet with Cardona-Cardona. (Tr. 902-03, 906, 1047, 1056-57) Landji also introduced a stipulation stating that Okland Aviation was formed in 2016. (Tr. 903-04; DX S-B) Landji argued that this stipulation showed that Landji had not leased a plane through Okland

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Aviation during the alleged drug operation in 2009. (Tr. 1056) Landji also introduced a stipulation showing that Okland Aviation — during the time period alleged in the Indictment — had leased three planes registered in Morocco. (Tr. 904-06; DX S-C) Landji argued that his access to three Moroccan-registered planes made it implausible that he would have agreed to use a U.S.-registered plane to smuggle cocaine into Croatia. (Tr. 1021-23, 1046)

Adamu did not offer any evidence. (Tr. 906)

* * * *

At the close of the evidence, Landji and Adamu moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29, arguing that there was insufficient evidence to support a conviction. (Tr. 953-54) The Court reserved decision on their motions. (Tr. 955)

In Landji's summation, counsel argued that Landji had never agreed to transport cocaine for Cardona-Cardona, and that Cardona-Cardona, Fofana, and Rambo were just "spitballing ideas" with Landji at the May 2018 meetings in Lomé, Togo. (Tr. 1028 ("We are not arguing that Mr. Landji was not aware that [transporting drugs] was a subject of conversation. He is savvy. He is a hustler, . . . and he is no fool. He heard them out. He talked the talk. But that is not a crime. It is not a crime to talk to criminals. It is not a crime to discuss transporting drugs."); *see also* Tr. 1008, 1016-18, 1024-25) Both Adamu and Landji argued that Cardona-Cardona was not a credible witness, given

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his prior crimes, which included acts of violence. (Tr. 1008, 1012, 1052-66, 1070, 1072-78) Landji and Adamu also argued that someone else — possibly Fofana (according to Landji) or Croatian law enforcement authorities (according to Adamu) — had planted cocaine on the Gulfstream II aircraft. (Tr. 1006, 1014-15, 1037, 1049-51, 1067, 1082-85)

DISCUSSION**I. LEGAL STANDARDS****A. Rule 29 Motions**

Federal Rule of Criminal Procedure 29(a) provides that a court shall, upon a defendant’s motion, “enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a).

“In evaluating a sufficiency challenge, [a court] ‘must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government’s favor, and deferring to the jury’s assessment of witness credibility and its assessment of the weight of the evidence.’” *United States v. Coplan*, 703 F.3d 46, 62 (2d Cir. 2012) (quoting *United States v. Chavez*, 549 F.3d 119, 124 (2d Cir. 2008)); *see also United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984) (“The court should not substitute its own determination of the credibility of witnesses, the weight of the evidence and the reasonable inferences to be drawn for that of the jury.” (citation omitted)). In assessing a sufficiency

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challenge, “[t]he evidence is to be viewed ‘not in isolation but in conjunction.’” *Mariani*, 725 F.2d at 865 (quoting *United States v. Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969)). “So long as the inference is reasonable, ‘it is the task of the jury, not the court, to choose among competing inferences.’” *United States v. Kim*, 435 F.3d 182, 184 (2d Cir. 2006) (quoting *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995)).

“The Second Circuit has observed that ‘[t]hese strict rules are necessary to avoid judicial usurpation of the jury function.’” *United States v. DiPietro*, No. S502 Cr. 1237 (SWK), 2005 U.S. Dist. LEXIS 15999, 2005 WL 1863817, at *1 (S.D.N.Y. Aug. 5, 2005) (quoting *Mariani*, 725 F.2d at 865) (alterations in *DiPietro*). “[T]he task of choosing among competing, permissible inferences is for the fact-finder, not for the reviewing court.” *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001) (citation omitted). Given this standard, “[a] defendant bears a ‘very heavy burden’ in challenging a conviction based on insufficient evidence.” *United States v. Goldstein*, No. S2 01 Cr. 880 (WHP), 2003 U.S. Dist. LEXIS 7032, 2003 WL 1961577, at *1 (S.D.N.Y. Apr. 28, 2003) (quoting *United States v. Brewer*, 36 F.3d 266, 268 (2d Cir. 1994)).

B. Rule 33 Motions

Pursuant to Federal Rule of Criminal Procedure 33, a court may “vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33. “Rule 33 confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert

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a perceived miscarriage of justice,” *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir. 1992). Courts may not only grant a Rule 33 motion where the evidence is legally insufficient, *see United States v. Leslie*, 103 F.3d 1093, 1100-01 (2d Cir. 1997), but also where a jury’s verdict is contrary to the weight of the evidence, *see United States v. Ferguson*, 246 F.3d 129, 136 (2d Cir. 2001). Moreover, in contrast to the analysis under Rule 29, a district court considering a Rule 33 motion need not view the evidence in the light most favorable to the Government. *United States v. Lopac*, 411 F. Supp. 2d 350, 359 (S.D.N.Y. 2006) (citing *United States v. Ferguson*, 49 F. Supp. 2d 321, 323 (S.D.N.Y. 1999), *aff’d*, 246 F.3d 129 (2d Cir. 2001)).

The Second Circuit has explained that

[t]he ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. The trial court must be satisfied that competent, satisfactory and sufficient evidence in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. There must be a real concern that an innocent person may have been convicted. Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, but it nonetheless must exercise the Rule 33 authority sparingly and in the most extraordinary circumstances.

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Ferguson, 246 F.3d at 134 (quotation marks and citations omitted).

Under Rule 33, “[i]n the exercise of its discretion, the court may weigh the evidence and credibility of witnesses.” *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000) (citing *Sanchez*, 969 F.2d at 1413). However, “[t]he district court must strike a balance between weighing the evidence and credibility of witnesses and not ‘wholly usurp[ing]’ the role of the jury.” *Ferguson*, 246 F.3d at 133 (quoting *Autuori*, 212 F.3d at 120) (second alteration in *Ferguson*). “Because the courts generally must defer to the jury’s resolution of conflicting evidence and assessment of witness credibility, ‘[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.’” *Id.* at 133-34 (quoting *Sanchez*, 969 F.2d at 1414) (alteration in *Ferguson*). Such “exceptional circumstances” may exist “where testimony is ‘patently incredible or defies physical realities.’” *Id.* at 134 (quoting *Sanchez*, 969 F.2d at 1414).

II. ANALYSIS

A. Motions for a Judgment of Acquittal

Landji and Adamu contend that there is insufficient evidence that (1) they participated in the charged conspiracy; or (2) the conspiracy involved five kilograms or more of cocaine.³ In arguing insufficiency, Defendants’

3. The jury concluded that each Defendant had had personal involvement with five kilograms or more of cocaine, or that it was

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primary argument is that Cardona-Cardona was not a credible witness. (Landji Br. (Dkt. No. 638) at 46-49; Adamu Br. (Dkt. No. 639) at 3-9; Landji Reply Br. (Dkt. No. 648) at 5-7)

At trial, the Government's case centered on Cardona-Cardona's testimony. As the head of the alleged drug trafficking conspiracy, Cardona-Cardona was ideally situated to testify regarding the roles that Landji and Adamu played in that conspiracy.

Cardona-Cardona testified that on four occasions in 2009 and 2010 he had attempted to traffic cocaine with Landji and Adamu. (Tr. 271-80, 286-90, 326-39, 342-47) None of those efforts was successful. In 2016 — after Landji acquired the Gulfstream II aircraft — he contacted Cardona-Cardona to discuss a new plan to traffic in cocaine. The two men met in Lomé, Togo shortly thereafter to discuss their plan to distribute cocaine using the Gulfstream II. (Tr. 261-62, 348-53) Cardona-Cardona testified that he and Landji met in Lome again in 2016 or 2017 — this time with Adamu — and at that meeting, they all agreed to transport ton-quantities of cocaine from South America to West Africa. (Tr. 353-61) Cardona-Cardona also testified about Landji's and Adamu's preparations for this plan, including undergoing pilot training, performing maintenance on the Gulfstream II, and researching potential landing strips in the Western Sahara. (Tr. 363-74, 385-86)

reasonably foreseeable to him that the conspiracy involved five kilograms or more of cocaine. (Verdict (Dkt. No. 605))

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Cardona-Cardona also testified that, during additional meetings held in May 2018 in Lomé, Togo, Landji agreed to transport a test shipment of one kilogram of cocaine to Europe as part of a larger scheme to traffic in cocaine with Rambo and others. (Tr. 416-18, 451-54, 457, 461, 492-93) Although Adamu did not attend these meetings in Lomé, Cardona-Cardona testified that Fofana updated Adamu as to the discussions in Lomé, and that Fofana kept Cardona-Cardona apprised of Landji's and Adamu's preparations leading up to the test shipment flight. (Tr. 253-54, 374, 504-05) Cardona-Cardona also testified that he and Landji met in Sierra Leone in late 2018 to discuss the status of the operation, and that Cardona-Cardona — at Landji's request — provided Landji with an additional \$300,000 for maintenance costs associated with the Gulfstream II and for costs associated with changing the registration of the plane. (Tr. 511-13) Cardona-Cardona further testified that — through co-conspirator Fofana — he notified Landji and Adamu that the one-kilogram of cocaine test shipment would be transported to Zagreb, Croatia rather than Montenegro; that they should leave the cocaine in the plane after landing in Zagreb; and that Cardona-Cardona would himself retrieve the cocaine from the plane. (Tr. 519-20, 523-24) Finally, Cardona-Cardona testified about his arrest in Zagreb on October 29, 2018. (Tr. 528)

Cardona-Cardona's detailed testimony about Landji's and Adamu's involvement in the charged conspiracy — if credited by the jury — is sufficient on its own to sustain their convictions for conspiring to distribute five kilograms or more of cocaine. *See United States v. Truman*, 688 F.3d 129, 139 (2d Cir. 2012) (“[E]ven the testimony of a single

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accomplice witness is sufficient to sustain a conviction, provided it is not incredible on its face, or does not defy physical realities.” (quotation marks, alteration, and citations omitted)).

Landji and Adamu argue that Cardona-Cardona’s history of “deceit” and “perjury” renders his testimony incredible as a matter of law. (*See* Landji Br. (Dkt. No. 638) at 47-49; Adamu Br. (Dkt. No. 639) at 3-4, 6; *see also* Landji Reply Br. (Dkt. No. 648) at 5) In this regard, Defendants argue that Cardona-Cardona lied to (1) Italian authorities in order to obtain a lesser sentence in a cocaine trafficking case in Italy; and (2) authorities in Mali — and subsequently bribed government officials in Mali — in order to obtain a lesser sentence for murdering a competing drug dealer. (Landji Br. (Dkt. No. 638) at 47; Adamu Br. (Dkt. No. 639) at 3-4; *see* Tr. 281-86, 640-45) Landji also argues that Cardona-Cardona’s testimony that he had only committed one murder since he began trafficking drugs in the 1990s, and that he had given Landji “over one million dollars to conduct fruitless drug trafficking operations in Venezuela,” is “patently incredible.” (Landji Br. (Dkt. No. 638) at 47; *see* Tr. 541-42, 544-45, 555-57, 563, 572-75, 580-82)

The matters now cited by counsel were the subject of extensive cross-examination and argument before the jury, and the issue of Cardona-Cardona’s credibility was for the jury. *Truman*, 688 F.3d at 139 (“The proper place for a challenge to a witness’s credibility is in cross-examination and in subsequent argument to the jury, not in a motion for judgment of acquittal.” (quotation marks,

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alteration, and citations omitted)). Defense counsel questioned Cardona-Cardona extensively about the perjury, drug trafficking, bribery, and murder offenses he had committed in the past, and elicited from Cardona-Cardona that he was testifying against Landji and Adamu in order to obtain a more lenient sentence. (*E.g.*, Tr. 541-42, 545-46, 559-563, 652-58, 676) Cardona-Cardona's alleged lack of credibility was also the centerpiece of the defense jury addresses. Defense counsel argued that Cardona-Cardona was a "psychopath" and a "sociopath," and they urged the jury not to credit his testimony. (*E.g.*, Tr. 65-66, 75, 1005, 1008, 1052-54, 1066, 1068, 1072-73, 1077-78) Moreover, in the jury charge, the Court instructed the jury that the "testimony of a cooperating witness [like Cardona-Cardona] must be scrutinized with special care and caution." (Tr. 1133-36) In short, the issue of Cardona-Cardona's credibility or lack of credibility was squarely put to the jury. Indeed, it was the central issue at trial.

The Government offered ample evidence corroborating Cardona-Cardona's testimony. The corroborating evidence included the following: (1) video and audio recordings of the May 2018 meetings in Lomé, Togo in which Landji agreed to transport ton-quantities of cocaine on planes with Adamu (*see, e.g.*, GX 301A, 301C, 302A-T, 302C, 302D, 302E, 302F, 303B, 303C, 303D, 303E, 303F, 303G, 303H, 303I-T, 303J-T, 303K-T, 303L, 303M, 303N-T, 303O-T, 303P, 303Q-T, 303S-T, 303T, 303U-T, 304A, 304B, 304C, 304D, 305A, 305B-T, 305C-T, 305D-T); (2) photographs and videos from Landji's phone showing that Landji had inspected remote landing strips in West Africa (GX 502Q, 502X, 502Y); (3) text messages between Landji

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and Adamu and between Landji and Cardona-Cardona regarding Adamu's pilot training (GX 501U1, 501Z1-T); (4) text and telephone records showing Landji's and Adamu's continued coordination with each other and with Fofana and Cardona-Cardona in advance of the one-kilogram of cocaine test shipment (GX 501Y4-T, 501Y7-T, 501Y10-T, 501Y11-T, 501Z5-T, 503L, 503N4, 503N5, 503N6, 502O, 503R3, 503T); (5) recordings of intercepted telephone calls between Cardona-Cardona and Fofana in October 2018 in which Cardona-Cardona and Fofana discuss the difficulties in obtaining the one-kilogram sample of cocaine, and in which Cardona-Cardona instructs Fofana that Landji and Adamu should leave the cocaine in the plane after landing in Zagreb (*see* GX 401-T, 402-T, 403-T, 404-T, 405-T, 406-T, 407-T); (6) testimony from Croatian law enforcement officers that approximately one kilogram of a white powdery substance with "characteristics of cocaine" was found on the Gulfstream II when the plane landed in Zagreb (Tr. 143-45, 147, 179-85; GX 102-03, 234); and (7) Adamu's post-arrest statements, in which he admitted that he knew that Cardona-Cardona used planes to traffic cocaine, and that Adamu had previously piloted a plane to Panama that was later found loaded with cocaine (Tr. 708-10).

Landji argues, however, that (1) the video recordings of the May 2018 meetings are "ambiguous" and "incomprehensible," because the individuals in these recordings were "speaking over each other in multiple languages"; (2) there is no "reliable interpretation" of the text messages extracted from Landji's and Adamu's cell phones; and (3) the Government did not prove that the

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white powdery substance recovered from the Gulfstream II was in fact cocaine. (Landji Br. (Dkt. No. 638) at 46-47)

As to the video recordings, the parties stipulated to the accuracy of the English translations of the French portions of these recordings, and these English translations were admitted into evidence. (GX 1002; Tr. 377-82, 1129) A rational jury could have found that the English translations show: (1) Landji agreeing that the Gulfstream II's registration in the United States would have to be changed in order to avoid criminal liability in the United States (GX 303J-T, 303K-T, 303N-T, 303O-T, 305A-T); (2) Landji proposing that Adamu do the "dirty work" for the cocaine trafficking operation under the guise of Okland Aviation (GX 303Q-T, 303S-T); and (3) Landji agreeing to use an encrypted phone for further communications with Cardona-Cardona and other members of the conspiracy (GX 305D-T).

As to the English language portions of the recordings, defense counsel had ample opportunity to challenge their significance at trial, and did so.⁴ Viewed in a light most favorable to the Government, the English language portions of the recordings show, *inter alia*, (1) Landji agreeing to fly two tons of "paper" — code for cocaine — while keeping the seats of the Gulfstream II in place (GX 301C; Tr. 410-12); (2) Landji agreeing to fly a test shipment to show investors that the "line is open" (GX 303B, at 9; Tr. 452-54); (3) Landji agreeing that they could "do two"

4. In his closing, Landji's lawyer argued that the video evidence is "incomprehensible" and "ambiguous." (*See* Tr. 1018-19)

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tons of cocaine every two weeks,⁵ and that “[m]ore flights” means “[m]ore money” (GX 303B, at 7-8; Tr. 451-52); and (4) Landji stating that they could transport “[o]ne ton” of “dope” on the King Air 350, which would be used for black flights (GX 303L, 304C; Tr. 463-66, 486-90).

In sum, while the recorded evidence presented challenges both as to intelligibility and ambiguity at certain points, it nonetheless constitutes compelling corroboration of Cardona-Cardona’s testimony.

Landji also complains that the Government was “incapable of establishing any reliable interpretation” of text messages among and between Landji, Adamu, and Fofana, because these messages were introduced through Enrique Santos — an investigative analyst employed by the U.S. Attorney’s Office, who “was not competent to testify as to the meaning of [the] messages.” (Landji Br. (Dkt. No. 638) at 46-47) But Santos did not testify as to the meaning of the messages. Instead, a reasonable jury could have discerned the meaning of the messages as a result of Cardona-Cardona’s testimony. Cardona-Cardona explained the roles of Landji, Adamu, and Fofana in the conspiracy, and his testimony provided a chronology that

5. Landji argues that this exchange is “vague” as to the quantity of drugs involved in the alleged conspiracy, because the conspirators only address “the weight that various airplanes *could* carry and the frequency with which flights *could* occur.” (Landji Br. (Dkt. No. 638) at 48 (emphasis in original)) But the jury could have concluded otherwise, given Landji’s responses during this discussion (“Okay”; “Yeah, we can do two”) and Cardona-Cardona’s testimony at trial. (See GX 303B, at 8; Tr. 451-52)

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assisted the jury in understanding the text messages. (See, e.g., GX 503R3 (May 27, 2018 message from Adamu to Landji asking what the “next plan” is, to which Landji responds, “standby[,]we are in meeting”); GX 503N4 (May 29, 2018 Adamu message to Fofana complaining that “jc is not contact” and that Adamu does not know “his program,” and Fofana’s response that he and Adamu should meet to discuss the “programme”)) Given Cardona-Cardona’s testimony that he, Landji, Adamu, and Fofana commonly used coded language in order to avoid detection (see Tr. 384-85, 388-89, 411-12, 485-86, 503-04, 517-19, 524-26, 622-23), the use of what appears to be purposely cryptic language in the text messages is indicative of guilt.

Landji also complains that the Government did not establish that the white powdery substance that Croatian law enforcement authorities found onboard the Gulfstream II aircraft after it landed in Zagreb was in fact cocaine. (Landji Br. (Dkt. No. 638) at 47; see Tr. 429-41 (bench ruling excluding purported cocaine on chain-of-custody grounds); Tr. 184 (Milunic testifying that Croatian law enforcement personnel performed field test on the white powdery substance, but not disclosing the results of the test))

As an initial matter, defense counsel introduced during the cross-examination of DEA Special Agent Anton Kohut two DEA Form 7 Report[s] of Drug Property Collected, Purchased or Seized (see DX AAA, DX BBB) stating that the white, powdery substance found on the Gulfstream II was in fact cocaine. (Tr. 229-41, 243) DX AAA states:

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Exhibit 1 consists of approximately one kilogram of cocaine. Exhibit 1 was discovered by Croatian officials inside a Gulfstream IIB jet which landed at Zagreb International Airport on 10-30-2019. Jean Claude OKONJO LANDJI and Jibril Bala ADAMU were taken into custody following this seizure. Croatian police maintained custody of Exhibit 1 and processed it as evidence in accordance with host country policies and procedures.

(DX AAA (emphasis in original))⁶

DX BBB states:

Exhibit 1a consists of a white powdery substance contained in a clear plastic bag. The exhibit was previously reported for information only under [redacted] as Exhibit 1; that exhibit was maintained by the Croatian National Police as evidence in a foreign prosecution. However on 06-24-2020, Inspector Ivica Sestak of the Croatian National Police transferred custody of the exhibit to Special Agent Anton Kohut of the DEA Zagreb Country Office for future domestic prosecution in SDNY. As the exhibit had since been analyzed, the precise weight determined

6. In introducing DX AAA, defense counsel highlighted typographical errors regarding, *inter alia*, the date of the seizure. (Tr. 229-31, 238-39) While Agent Kohut's report refers to a seizure on October 30, 2019 (DX AAA), the seizure actually took place on October 31, 2018. (See Tr. 110, 133-34, 137, 145, 229-31)

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(992.23 grams) and then physically turned over to DEA for the first time, this report documents the re-designation of the exhibit as Exhibit 1a.

(DX BBB) DX BBB indicates that Exhibit 1a contains 992.23 grams of cocaine hydrochloride. (*Id.*)

In any event, in order to demonstrate that the Defendants had conspired with Cardona-Cardona and Fofana to distribute and possess with intent to distribute five kilograms or more of cocaine, the Government was not required to prove that the one-kilogram “white powdery substance” found on the Gulfstream II was in fact cocaine. The elements of conspiracy to distribute or possess with intent to distribute a controlled substance are: (1) an agreement between two or more people to distribute or possess with intent to distribute a controlled substance; and (2) the defendant’s knowing and intentional participation in that conspiracy. *See United States v. Dupree*, 870 F.3d 62, 78 (2d Cir. 2017); *United States v. Santos*, 541 F.3d 63, 70-71 (2d Cir. 2008). The essence of this offense is an unlawful agreement, and the defendant’s knowing and intentional participation in the conspiracy. *See United States v. Svoboda*, 347 F.3d 471, 476 (2d Cir. 2003) (“The gist of conspiracy is, of course, agreement.” (quotation marks and citation omitted)); *see also United States v. Fabian*, No. 16-CR-131 (DLI), 2022 U.S. Dist. LEXIS 66598, 2022 WL 1085243, at *4 (E.D.N.Y. Apr. 11, 2022) (“The essence of conspiracy is an agreement among two or more persons to join in a concerted effort to accomplish an illegal purpose.” (quotation marks, alteration, and citation omitted)).

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Accordingly, the Government was required to prove that Landji and Adamu entered into an unlawful agreement with Cardona-Cardona and Fofana to distribute and possess with intent to distribute five kilograms or more of cocaine. While the presence of cocaine on the Gulfstream II would tend to support the Government's allegation that Landji and Adamu had entered into an unlawful agreement with Cardona-Cardona to distribute and possess with intent to distribute cocaine, the presence of cocaine on the Gulfstream II plane was not a prerequisite for a conspiracy conviction. *See United States v. Pauling*, 924 F.3d 649, 660 (2d Cir. 2019) ("Proof of drug quantity may be established through proof of an agreement to distribute or possess with intent to distribute, regardless of whether the substantive act was actually completed." (citing *United States v. Jackson*, 335 F.3d 170, 181 (2d Cir. 2003))); *Jackson*, 335 F.3d at 181 ("A member of a conspiracy is . . . liable for an act he agreed to and intended to commit in furtherance of the conspiracy regardless of whether he ultimately committed the substantive act."). Indeed, in countless narcotics conspiracy cases — including "reverse cases" in which law enforcement agents pose as drug traffickers — there is never any actual controlled substance. This presents no impediment to the Government proving the crime of narcotics conspiracy.

In sum, Landji's argument that the Government did not introduce into evidence the one-kilogram of cocaine allegedly found on the Gulfstream II does not demonstrate insufficiency.

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Adamu likewise raises several arguments challenging the sufficiency of the Government's evidence. Adamu first contends that the Government did not demonstrate that Cardona-Cardona and Adamu were in contact with each other regarding the plan to traffic in cocaine, or that Fofana served as a "bridge" between Cardona-Cardona and Adamu. In this regard, Adamu points out that (1) Fofana did not testify at trial; and (2) the Government did not introduce recordings of telephone calls between Adamu and Cardona-Cardona, or between Adamu and Fofana. (Adamu Br. (Dkt. No. 639) at 4)

As discussed above, however, the Government offered ample evidence of Adamu's guilt, including the following: (1) Cardona-Cardona's testimony regarding his discussions with Adamu in 2010 about transporting tons of cocaine from South America to West Africa (Tr. 271-80, 354, 708-09); (2) Cardona-Cardona's testimony regarding his discussions with Landji in 2016 about using Adamu as a pilot to transport drugs, and the training Adamu would need to pilot the Gulfstream II for this purpose (Tr. 348-50, 354); (3) Cardona-Cardona's testimony that he, Landji, Adamu, and Fofana met in Lomé, Togo in 2016 or 2017 to discuss the air transport of huge quantities of cocaine from South America to West Africa, and that Adamu requested during these meetings that he be paid \$250,000 per flight (Tr. 353-61); (4) text messages among Adamu and Landji and Fofana discussing the progress of the operation and Adamu's training to pilot the Gulfstream II (GX, 501U1, 503N4, 503R3; *see also* Tr. 350, 374, 385-86, 409-10, 807); (5) text messages between Adamu and Fofana discussing that "David" would meet Adamu "[a]t the appointment"

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(GX 503N6); (6) Cardona-Cardona's testimony that Adamu told Fofana that the kilogram of cocaine was hidden on the Gulfstream II (Tr. 525-28); and (7) Adamu's post-arrest statements acknowledging that he knew that Cardona-Cardona was a drug trafficker, that Adamu had flown a plane to Panama for Cardona-Cardona, and that that plane later crashed in Mali while loaded with five tons of cocaine (Tr. 707-10).

As to the flight to Panama, Adamu argues that this evidence does not establish a connection between him and Cardona-Cardona's drug trafficking, because Adamu was not aware at the time of his flight to Panama that the plane would later be used to traffic drugs. (Adamu Br. (Dkt. No. 639) at 4) Adamu further argues that his post-arrest statement — in which he acknowledged that Cardona-Cardona is a drug trafficker — “is not surprising,” given the “widespread publicity” regarding the crashing of the plane in Mali, and the discovery that it was loaded with drugs. (*Id.* at 6) These arguments — which Adamu also made to the jury (Tr. 1078-79) — are not persuasive. Cardona-Cardona testified that Adamu was fully aware that the plane he piloted to Panama — and was expected to fly back to West Africa — was intended to carry cocaine. According to Cardona-Cardona, at the last minute, “the owners of the drugs decided to switch pilots.” (Tr. 278-29) Cardona-Cardona also testified that Adamu later demanded that Cardona-Cardona pay him \$20,000 for his role in flying the plane to Panama, even though Adamu had not been chosen to fly the plane during the remainder of the operation. (Tr. 279)

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As noted above, Cardona-Cardona also testified that he and Adamu had discussed purchasing a King Air 350 or Cessna Conquest II to traffic between 800 kilograms and one ton of cocaine at a time. (Tr. 271-77) This testimony was corroborated by Adamu's post-arrest statement acknowledging that he had helped broker airplane sales for Cardona-Cardona, and that he knew that Cardona-Cardona used such planes for "drug smuggling." (Tr. 709-10)

In sum, there was ample evidence of Adamu's knowledge and intent to assist Cardona-Cardona in a plot to transport huge quantities of cocaine from South America, to West Africa, and on to Europe.

Adamu argues, however, that Cardona-Cardona's arrest in Zagreb the day before the test flight "undercut[s]" Cardona-Cardona's testimony and that of the Croatian police officers. According to Adamu, he and Landji would not have flown the cocaine to Zagreb if they had been "unable to contact a major cog on the distribution chain." (Adamu Br. (Dkt. No. 639) at 5-6) Adamu appears to be arguing that the Croatian National Police planted the cocaine on the Gulfstream II, and then falsely testified that they discovered the cocaine onboard the plane, because "they [had] placed their investigation in great jeopardy" by prematurely arresting Cardona-Cardona. (*Id.* at 5-6) Adamu made this argument to the jury (Tr. 78, 111-12, 1081-85), and it was rejected. It provides no basis for this Court to find the evidence insufficient.

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Adamu also contends that there is insufficient evidence that the Gulfstream II was registered in, or owned by a citizen of, the United States. (Adamu Br. (Dkt. No. 639) at 3) This argument likewise fails. At trial, the parties stipulated that Landji was a citizen of the United States during the relevant time period; that he purchased the Gulfstream II in 2016 and has owned it since that time; and that the Gulfstream II was registered in the United States since at least 2016. (GX 1000; *see* Tr. 895-96) This evidence was sufficient to establish the necessary nexus with the United States. *See* 21 U.S.C. § 959(c).⁷

Landji's and Adamu's motions for a judgment of acquittal pursuant to Rule 29 will be denied.

B. Rule 33 Motions for New Trial

Landji and Adamu argue that they are entitled to a new trial under Fed. R. Crim. P. 33 because (1) this Court admitted extractions from the Defendants' cell phones through the testimony of Enrique Santos — an analyst at the U.S. Attorney's Office — who did not himself perform the extractions; and (2) the venire and petit jury did not reflect a fair cross-section of the community. (Landji Br. (Dkt. No. 638) at 33-40, 42-44; Landji Reply Br. (Dkt. No. 648) at 718; Adamu Br. (Dkt. No. 639) at 9-14)

7. 21 U.S.C. § 959(c) provides that “[i]t shall be unlawful for any United States citizen on board any aircraft, or any person on board an aircraft owned by a United States citizen or registered in the United States, to — (1) manufacture or distribute a controlled substance or listed chemical; or (2) possess a controlled substance or listed chemical with intent to distribute.”

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Landji further contends that (1) he was prejudiced by the presence of the alleged cocaine in the courtroom, because the Court ruled in the course of the trial that the alleged cocaine was inadmissible; and (2) Landji's conditions of confinement during trial deprived him of a meaningful opportunity to participate in his defense. (Landji Br. (Dkt. No. 638) at 40-42, 44-45)

1. Cell Phone Extractions**a. Background**

At trial, the Government introduced three cell phones that had been seized from Landji and Adamu at the time of their arrest in Zagreb (GX 104-06), along with excerpts from the extraction reports concerning the contents of these cell phones.⁸ The excerpts from the extraction reports were introduced through Enrique Santos, an investigative analyst and mobile phone forensics examiner at the U.S. Attorney's Office.

8. GXs 104 and 105 are, respectively, an Apple [Phone 7 Plus and Samsung Galaxy S9+ cell phone that allegedly belonged to Landji. (Tr. 790, 830-31; *see, e.g.*, Tr. 797-98, 800-01, 835-37 (describing attribution data contained on those devices)) GX 106 is a Samsung Galaxy J7 cell phone that allegedly belonged to Adamu. (Tr. 853; *see, e.g.*, Tr. 856-57 (describing attribution data contained on this device)) GX 500 is a hard drive containing forensic images and reports regarding the contents of these phones. (Tr. 736-37) GX 500A is the extraction report corresponding to GX 104; GX 500B is the extraction report corresponding to GX 105; and GX 500C is the extraction report corresponding to GX 106, (Tr. 788, 831, 853)

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While Croatian analysts — and not Santos — had performed the cell phone extractions, the Government argued that Santos was competent to testify regarding the process used to perform the extractions because, *inter alia*, (1) Santos used Cellebrite — the forensic software program employed by the Croatian analysts to perform the extractions — each day during his work at the U.S. Attorney’s Office; (2) the Cellebrite software makes a forensic copy of the contents stored on a cell phone that cannot be altered or edited; and (3) the Cellebrite software extraction report reveals the unique IMEI number for each source cell phone, which can be matched to the actual cell phone. (*See* Oct. 13, 2021 Govt. Ltr. (Dkt. No. 585) at 3-10; Tr. 117-25)

Defendants objected to the cell phone extractions, arguing that (1) Santos could not authenticate the cell phone extractions, because he had not performed the extractions; and (2) Landji’s and Adamu’s Sixth Amendment Confrontation Clause rights would be violated because they had no opportunity to cross-examine the Croatian analysts who had performed the extractions. (Oct. 11, 2021 Jt. Def. Ltr. (Dia No. 583) at 2; Oct. 13, 2021 St. Def. Ltr. (Dkt. No. 586) at 2-5; Tr. 117-25)

While Defendants’ objections to the cell phone extractions were pending, the jury heard testimony regarding the seizure of Defendants’ phones. Tomislav Milunic — a Croatian National Police officer — testified that, during his search of the Gulfstream II on October 31, 2018, he recovered a bag that contained two cell phones. (Tr. 139) Landji told Milunic that the bag belonged to

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him. (Tr. 140-41) Milunic also recovered two cell phones belonging to Adamu. (Tr. 148) Later that day, Milunic gave the phones to Inspector Ivica Sestak of the Croatian National Police. (Tr. 148-49)

Agent Kohut testified that, on October 15, 2019, he took custody of the cell phones and other evidence seized from the Gulfstream II. (Tr. 206) Sestak gave Agent Kohut the evidence which was sealed in evidence bags — along with a detailed inventory of the evidence. (Tr. 206-09) Kohut later unsealed these evidence bags at the U.S. Attorney’s Office for the Southern District of New York, and he confirmed that the evidence bags contained the cell phones and the hard drive listed in the inventory. (Tr. 209-10)

On October 14, 2021 — in the midst of trial — this Court issued a bench ruling denying Defendants’ motions to exclude the cell phone extractions. (Tr. 303-15) Relying on the Government’s offer of proof regarding Santos’s anticipated testimony (*see* Oct. 13, 2021 Govt. Ltr. (Dkt. No. 585) at 3-10), this Court concluded that neither Fed. R. Evid. 901, nor the Confrontation Clause, prohibited the admission of the cell phone extractions. (Tr. 307-15) In so ruling, this Court noted that

(1) Government Exhibit 500A, 500B, and 500C are reports concerning the extraction of data from cell phones; (2) the extraction reports are forensic images that were created through the use of Cellebrite, a software tool with which [Santos is] familiar; (3) Cellebrite creates

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an exact copy of data from cell phones, and the image[s] this program contains are not subject to editing or alteration; (4) each cell phone has an [International Mobile Equipment Identifier (“IMEI”)] number which is unique; (5) each of the three cell phones at issue has an IMEI number that Santos has identified; (6) the forensic image created by the Cellebrite software reveals the IMEI number for the source cell phone; and (7) by comparing the IMEI numbers, Santos has matched each of the forensic reports with one of the three cell phones.

(Tr. 310-11) This Court further noted that Santos would testify that certain “attribution” data found in the extraction reports — including “selfies” and email addresses containing the Defendants’ names — provided further confirmation that the cell phones on which the extraction reports were based belonged to the Defendants. (Tr. 311)

In rejecting Defendants’ motion to exclude the cell phone extractions, this Court cited *United States v. Gayle*, No. 16 Cr. 361 (CS) (S.D.N.Y.), in which Judge Seibel had admitted cell phone extractions through Santos’s testimony, even though Santos had not performed the extractions. (Tr. 311-12 (citing Oct. 13, 2021 Govt. Ltr., Ex. 1 (Sept. 14, 2017 *Gayle* transcript) (Dkt. No. 585-1)) As to Defendants’ Confrontation Clause argument, this Court noted that Santos would testify — based on the above-stated facts — that data presented in the extraction

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reports had been extracted from the Defendants' cell phones, and that he could be cross-examined as to the basis for his conclusions. (Tr. 314) This Court also distinguished cases cited by Defendants — including *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) and *United States v. Hajbeh*, 565 F. Supp. 3d 773 (E.D. Va. 2021) because they involved the admissibility of affidavits or certifications regarding forensic analysis. (Tr. 312-14)

On October 20, 2021 — after the Court's ruling — the Government called Santos to testify. (*See* Tr. 726) Santos testified that he had received approximately 160 hours of formal classroom training in mobile device forensics; that he had attended numerous conferences and workshops related to forensics; that he belongs to a number of forensics-related associations; and that he is trained and certified in a number of mobile device forensic tools, including the Cellebrite forensics software program. (Tr. 728-29) Santos has used the Cellebrite software tool “every single day since 2014” during his work at the U.S. Attorney's Office; has performed more than 2,000 cell phone extractions using the Cellebrite program; and has analyzed Cellebrite cell phone extractions performed by others approximately fifty times. (Tr. 729, 747)

Santos explained in detail the three-step process by which a Cellebrite cell phone extraction is performed, including “acquisition,” “analysis,” and “reporting.” (Tr. 730-31) During the acquisition stage, cell phone data is downloaded and preserved as a “forensic image” — a

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compilation of data that cannot be altered or edited.⁹ (Tr. 730-33, 750) Although the data contained in a cell phone can be manipulated before a forensic image is created — for example, by placing a call or sending a text message — “[i]n most cases” any changes made to the contents of a cell phone device prior to an extraction would be apparent through a “timestamp” indicating the last action(s) taken with that device. (Tr. 750-51)

When using the Cellebrite software program to perform an extraction, the user must select a “profile” on Cellebrite that matches the make and model of the phone. Once a profile is selected, the analyst must choose which type of extraction to perform, and the Cellebrite tool can then download the data. (Tr. 747-49) A “unique qualifying number[]” is recorded in the forensic image to ensure that the forensic image can be matched to the physical cell phone. (Tr. 733) An International Mobile Equipment Identifier (“IMEI”) is an example of a “unique qualifying

9. Santos testified that the capabilities of the Cellebrite software have evolved over time, as cell phone manufacturers introduce new security features that can affect the types of data that can be retrieved from cell phones. In January 2019 — when the extractions in this case were performed — the Cellebrite software was able to recover “a lot of the data” commonly stored on cellphones, including “call histories, messages, photos, videos, web browsing history, notes, [and] voice messages.” (Tr. 748-49; see also Tr. 791, 859, 881-82 (testifying that a forensic image is not a copy of all data stored on a phone, unless a “physical extraction” is performed); Tr. 792, 832-33, 855 (testifying about the types of extractions performed on cell phones, and noting that a physical extraction had only been performed on the Samsung Galaxy J7 cell phone (GX 106)))

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number” for cell phones that can be used to correlate a forensic image with a particular cell phone. (Tr. 733-36; *see also* Tr. 753)

During the “analysis” stage, an analyst parses through the data recorded in the forensic image and can separate that data into different categories. (Tr. 730-31) “[F]or example, all the different chats would be put together, all the different images, the videos, web browsing history, and the like.” (Tr. 731)

The third and final stage of a Cellebrite extraction involves “creat[ing] a report that gets turned over to . . . a prosecutor or agent.” (*Id.*) At this stage in the extraction process, a user “can never . . . modify the content of a message” or “edit anything” within the report. A user of the Cellebrite software can, however, “exclude certain items from a report,” as either “entire categories of data, or . . . very specific records.” (Tr. 752)

In connection with the instant case, Santos examined three cell phones and a hard drive containing forensic images and extraction reports created by the Croatian National Police. (Tr. 737-38) Santos determined that the forensic images found on the hard drive were created in January 2019 using the Cellebrite forensic software program, and that the forensic images could not have been altered after they were generated. (Tr. 737-38, 749) By comparing the IMEI numbers listed on the extraction reports to those engraved on the cell phones, Santos was able to match each extraction report to the corresponding cell phone. (Tr. 738) Santos confirmed Landji’s and

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Adamu’s use of the seized cell phones from certain identifying data contained in the extraction reports.¹⁰ (Tr. 739-40) Santos also compared the size of the data in each extraction report with the size of the data in the corresponding forensic image, and he concluded that each extraction report reflected the contents of each forensic image. (Tr. 753-54)

During Santos’s testimony, the Government offered excerpts from the extraction reports, including certain text messages, photos, and videos.¹¹ (Tr. 739-41) Landji — joined by Adamu renewed his Rule 901 objections to this evidence at sidebar, offering a variety of arguments. (See Tr. 742-46, 755-66) Landji first argued that Santos

10. As discussed below, Santos testified that such identifying data, or “attribution” data, includes, *inter alia*, photos or “selfies” of the Defendants, as well as email addresses and user accounts associated with them. (See Tr. 796-801, 833-37, 856-57)

11. See GX 501, 501A, 501B, 501C, 501D, 501E, 501F, 501G, 501H, 501I, 501J, 501K, SOIL, 501M, 501N, 501O, 501P, 501Q, 501R, 501S, 501T, 501U1, 501U2, 501U3, 501U4, 501V, 501W, 501X, 501AA, 501CC, 501DD, 501EE, 501FF, 502, 502A, 502B, 502C, 502D, 502E, 502F, 502G, 502H, 502I, 502J, 502K, 502L, 502M, 502N, 502O, 502P, 502Q1, 502R, 502S, 502T, 502U, 502V, 502W, 502X1, 502Z1, 502AA, 502AA1, 503, 503A, 503B, 503C, 503D, 503E, 503F, 503G, 503H, 503I, 503J, 503K, 503L, 503M, 503M1, 503N1, 503N2, 503N3, 503N4, 503N4A, 503N4B, 503N5, 503N5A, 503N5B, 503N5C, 503N5D, 503N5E, 503N5F, 503N5G, 503N5H, 503N5I, 503N6, 503N6A, 503N6B, 503N6C, 503O, 503P, 503Q, 503R1, 503R1A, 503R2, 503R3, 503R3A, 503R3B, 503R4, 503R4A, 503R5, 503S, 503T, 503U, 503X, 503Y, 503Z, and 503AA; *see also* GX 501Y1 to 501Y12, 501Z1 to 501Z5, 501BB, 502Q, 502X, 502Y, 502Z, 503V, 503W (exhibits that were already in evidence).

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had not adequately addressed whether the data on the cell phones could be altered before the forensic image was made or during the process of creating the forensic image. (Tr. 742-45) Landji later argued that (1) Santos was not competent to testify whether the forensic image reflects a “full copy” of all the data on the cell phones; and (2) the forensic image of the data on a cell phone might contain exculpatory material not reflected in the extraction report. (Tr. 757-60)

In response to Landji’s arguments, this Court commented that

the principal issue here[] . . . is whether the material on the phone could have been edited or manipulated in some fashion such that what we are going to be seeing is not an accurate representation of what was actually on the phone, and in fact is a fabrication... . [T]o the extent the objection is that not all of the data on the phone was extracted, to me, that sounds like the kind of objection that goes to the weight of the evidence rather than its admissibility.

(Tr. 765; *see also* Tr. 756-59)

The next morning, this Court overruled Defendants’ objection to the cell phone extraction evidence. (Tr. 776-84) In so ruling, this Court noted that Santos had “testified in a manner that was generally consistent with the [G]overnment’s proffer” underlying the Court’s earlier ruling. Santos had deviated from the Government’s proffer

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only to the extent that he testified that the Cellebrite software does not necessarily result in a copy of all data from a cell phone.¹² (Tr. 776, 782) This fact did not require the Court to alter its analysis, because the Government had sufficiently demonstrated that the forensic images are “what they purport to be”: “a compilation of data from the phones.” (Tr. 782-83)

With respect to the possible manipulation of the data on a cell phone, this Court noted that Santos had testified that

(1) . . . any such manipulation would likely be revealed on the extraction report because of the timestamp feature; (2) once the forensic image is created, it’s not possible to alter its contents or to edit its contents; and (3) the data size of the forensic image matches the data size of each extraction report, indicating that each extraction report reflects all of the data contained in the forensic image.

(Tr. 783)

This Court also noted that there would be “ample evidence” — based on the data extracted from the cell phones — that each phone was in fact associated with the Defendants. (*Id.*)

12. See Tr. 782 (“Mr. Santos’ testimony indicates that the Cellebrite software may not have resulted in an exact copy of data from the cell phones and that certain material on the cell phones may not have been reproduced in the forensic image.”).

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“In light of the low threshold for authenticity that applies pursuant to Federal Rule of Evidence 901,” this Court concluded that any objection premised on the forensic image not capturing all the data on the Defendants’ phones “goes to the weight of this evidence and not to its admissibility.” (Tr. 784)

Following this ruling, Santos’s testimony continued, and the relevant excerpts from the Defendants’ cell phones were admitted into evidence. (Tr. 786-87) During his testimony, Santos pointed out that the IMEI number contained in the extraction reports matched those printed on the cell phones.¹³ (Tr. 787-89, 794-96, 831-32, 835, 853-54, 856) He explained what kinds of extractions were performed on each of the Defendants’ phones, and what kind of data were retrieved during these extractions. (Tr. 789-92, 794, 832-33, 854-55) According to Santos, “logical extractions,” “file system extractions,” and “physical extractions” are three types of extractions that can be performed on a cell phone, and “[n]ot every phone model supports every type of extraction.” (Tr. 791) A logical extraction — “the most widely supported type of extraction” — captures “mostly just live data, data that you can see on your phone and navigate to.” (*Id.*) A file system extraction is “less supported,” but captures more data, including the “file structure of a phone.” (*Id.*) A physical extraction is “the least supported type of extraction,” but captures “all the data” on a phone, including some deleted data. (Tr. 791, 855, 859, 882) Santos

13. Defendants also stipulated to this fact. (Tr. 795-96, 835, 854)

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testified that logical and file system extractions had been performed on each of the Defendants' phones, and that a physical extraction had been performed on Adamu's Samsung Galaxy J7 phone, GX 106.¹⁴ (Tr. 792, 832-33, 855)

Santos further testified that the data reflected in each forensic image were not altered or modified in any way, and that the excerpts of the corresponding reports accurately reflect the data contained in those forensic images. (Tr. 793, 833, 855-56)

Santos also testified about "attribution evidence" included in the cell phone extractions, including identifying email addresses, user account names, profile photos of Defendants, "sallies" taken by Defendants, and instances of Defendants referring to themselves in text messages.¹⁵ (*E.g.*, Tr. 796-801, 833-37, 856-57) Santos also testified about various excerpts from the extraction

14. "Screenshots" had also been manually extracted from GXs 104-05. (Tr. 792, 832-33)

15. For example, the email addresses "backlandaviation yahoo. fr," "jclandji@oklandaviation.com," and/or "oklandaviation@gmail.com" were associated with GXs 104 and 105, and jjibril@gmail.com" was associated with GX 106 (Tr. 797, 836, 856; GX 501A, 502B, 502C, 503C); "selfies" of Landji were found on GX 104 and GX 105, and one such "selfie" was used as the profile photo of the Whatsapp account on GX 104 (Tr. 798-801, 836; GX 501B, 501D, 502E to 502H); an incoming message on GX 105 states "Bonjour M LANDJI" (Tr. 835; GX 502A); documents with Landji's name — including a photo of Landji's passport — were found on GX 104 and GX 105 (Tr. 800-01, 837; GX 501C, 502J); and the Whatsapp ID name on GX 106 is "Jibril Adamu" (Tr. 856-57; GX 503B).

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reports, including contact list entries, call logs, text messages, voice notes, photographs, and videos, as well as the metadata associated with each of these items. (Tr. 796-830, 835-53, 856-76)

During cross-examination, defense counsel elicited from Santos that he had not examined the contents of the cell phones (Tr. 878-79, 881); that certain data, such as the name of a contact, could be changed on a cell phone without necessarily being reflected with a timestamp (Tr. 880-81); and that he did not know who had custody of the phones prior to his receipt of them (Tr. 879-80). Santos also acknowledged that the fact that a forensic image and extraction report contain the same amount of data does not conclusively establish that the data in each are the same. (Tr. 885)

Santos also testified that “[a] PDF from a Cellebrite report is usually read-only” and cannot be easily manipulated. (Tr. 882-83) A user cannot “backspace and delete stuff [as one can with a Word document].” (Tr. 883) Santos also stated that the extraction reports he reviewed indicated that none of the data had been altered or modified. (Tr. 884)

Landji and Adamu renewed their Rule 901 objection to the admissibility of the cell phone extractions based on Santos’s testimony during cross-examination. (Tr. 898) This Court overruled their objections, reiterating that the issues identified by Defendants “go[] to the weight of the evidence rather than the admissibility.” (Tr. 898-99) This Court also noted that it “view[ed] the [cell phone extraction] evidence as quite marginal in terms of its

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significance to the jury,” and that it “believe[d] the case [would] turn on the jury’s estimate of Mr. Cardona’s credibility,” (Tr. 899)

b. Whether the Cell Phone Extractions Were Properly Admitted Under Rule 901

In support of his Rule 33 motion, Landji contends that the cell phone extractions from his and Adamu’s cell phones were improperly admitted under Rule 901. Landji argues that (1) the cell phone data could have been manipulated prior to the creation of the forensic image; and (2) the cell phone data, as reflected in the extraction reports, could have been manipulated after the creation of the forensic image. (Landji Br. (Dkt. No. 638) at 34-38; Landji Reply Br. (Dkt. No. 648) at 8-16)

Under Fed. R. Evid. 901, the Government was required to provide an evidentiary basis from which the jury could find that the cell phone extractions offered by the Government are what they purport to be: a compilation of data extracted from the Defendants’ cell phones. The Second Circuit has summarized the legal standard for demonstrating authenticity as follows:

The bar for authentication of evidence is not particularly high. *United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001). “The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Fed. R. Evid. 901 (a). Generally, a document is properly

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authenticated if a reasonable juror could find in favor of authenticity. *United States v. Tin Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004). The proponent need not “rule out all possibilities inconsistent with authenticity, or 11 prove beyond any doubt that the evidence is what it purports to be.” *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999).

United States v. Gagliardi, 506 F.3d 140, 151 (2d Cir. 2007) (first alteration in *Gagliardi*).

With respect to potential manipulation of the cell phone data prior to the creation of the forensic image, Santos testified that, “[i]n most cases,” any manipulation of the data on a cell phone would be reflected through a “timestamp” on the phone. (Tr. 750-51) While Santos conceded that certain information — such as the name of a contact — could be changed without such a timestamp (Tr. 880), Landji has never argued that any of the cell phone extractions admitted at trial were actually altered. And, as discussed above, there was ample evidence that, for example, the Landji, Adamu, and Fo Lana Whatsapp messages introduced at trial were sent by them based on the profile photos, account usernames, and phone numbers associated with these messages.¹⁶ (*E.g.*, Tr. 798-803, 811, 826, 839-40, 856-58)

16. While the phone numbers themselves do not indicate who sent each message, when the phone numbers are considered together with the attribution data for each phone or Whatsapp account, the author of each Whatsapp message is clear. (*See, e.g.*, Tr. 798, 801-02, 806, 812-13, 825-26, 839-40, 857 (testimony regarding phone numbers associated with Defendants’ cell phones, Whatsapp accounts, and Whatsapp messages))

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Landji also contends that — if prior extractions were performed on the cell phones — the data contained on the cell phones could have been altered. (Landji Br. (Dkt. No. 638) at 37; see also Tr. 891-93) There is, of course, no evidence that prior extractions were performed on the cell phones. Moreover, Santos testified that, if such prior extractions had been performed, a forensics analyst “would potentially see artifacts of the first extraction.” (Tr. 892) In short, a reasonable jury could have concluded that the data contained on the cell phones were not altered before the forensic images were created.

As to possible manipulation of the data after the creation of the forensic images, Landji points out that Santos did not examine the forensic images or compare their contents to those contained in the corresponding extraction reports. (Landji Br. (Dkt. No. 638) at 37; *see* Tr. 883, 889-90) Santos testified, however, that, in converting the forensic image into an extraction report, a user “can never . . . modify the content of a message,” or “edit anything.” (Tr. 752)

Landji argues, however, that the extraction reports can be altered at a later date, and cites Santos’s testimony that the extraction reports are PDFs that can be made “editable.” (Landji Br. (Dkt. No. 638) at 36-37; Landji Reply Br. (Dkt. No. 648) at 11-12) But Santos’s testimony was more limited than Landji suggests. Although Santos testified that someone using “the right software” could make a PDF extraction report editable, he also testified that the “default option” for Cellebrite PDF reports is that they are “read-only.” (Tr. 882-83) He explained that the only way to edit such a PDF is to “writ[e] over” the

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content in the PDF “like . . . a typewriter,” but that “it’s not like a Word document where you can . . . backspace and delete stuff.” (Tr. 883) Moreover, Santos repeatedly emphasized that the extraction reports he reviewed did not appear to have been altered or modified in any way, and thus accurately reflected the data contained in the corresponding forensic images. (Tr. 792-93, 833, 855-56, 884) Santos also testified that the amount of data contained in the extraction reports matches the amount of data contained in the forensic images (Tr. 753-54, 885), indicating that the extraction reports reflect the data in the corresponding forensic images. In short, a reasonable jury could have concluded that the extraction reports had not been altered after the forensic images were created.

Landji also argues that the Government did not demonstrate that the forensic images and extraction reports were in fact derived from the Defendants’ cell phones, noting Santos’s testimony that the SIM card tray for iPhones — on which the unique IMEI number is printed — can be removed and replaced.¹⁷ (Landji Br. (Dkt. No. 637) at 37; *see also* Tr. 881) As discussed above, however, the “attribution evidence” found in the extraction reports provided a compelling basis for the jury to conclude that the extractions reports were in fact derived from data stored on the Defendants’ cell phones. (*See* Tr. 796-801, 833-37, 856-57)

17. This argument implicates only one of the three cell phones at issue — Landji’s Apple iPhone 7 Plus. The IMEI numbers for Landji’s Samsung Galaxy S9+ and Adamu’s Samsung Galaxy J7 are printed on each phone near the USB port or behind the battery. (Tr. 734-36)

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The Court concludes that the Government offered evidence sufficient to demonstrate that the cell phone extractions are what they “purport[] to be,” *Pluta*, 176 F.3d at 49. There was ample evidence that the cell phones belonged to the Defendants, and that the extraction reports reflect data that were stored on the Defendants’ cell phones. There is no evidence that the evidence derived from the Defendants’ cell phones was altered or manipulated in any way. Given that “[t]he bar for authentication of evidence is not particularly high,” *Gagliardi*, 506 F.3d at 151, and that the Government need not “rule out all possibilities inconsistent with authenticity,” *Pluta*, 176 F.3d at 49, the cell phone extractions were properly admitted. (See Oct. 13, 2021 Govt. Ltr., Ex. 1 (Sept. 14, 2017 transcript in *United States v. Gayle*, No. 16 Cr. 361 (CS)) (Dkt. No. 585-1) (admitting cell phone extractions through the testimony of Santos, who had not performed the extractions))

**c. Whether the Admission of the
Cell Phone Extractions Violated
Defendants’ Rights Under the
Confrontation Clause**

Defendants argue that the admission of the cell phone extractions violated their rights under the Sixth Amendment’s Confrontation Clause. (Landji Br. (Dkt. No. 638) at 38-40; Landji Reply Br. (Dkt. No. 648) at 16-18; Adamu Br. (Dkt. No. 639) at 13-14)

The Confrontation Clause bars admission of “testimonial statements” in a criminal case where the defendant does not have the opportunity to cross-

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examine the author of such statements. *See Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Supreme Court has applied the “primary purpose” test in defining whether a given statement is “testimonial,” which requires that “the statement was made or procured with a primary purpose of ‘creating an out-of-court substitute for trial testimony.’” *Washington v. Griffin*, 876 F.3d 395, 404 (2d Cir. 2017) (quotation marks and alteration omitted) (quoting *Ohio v. Clark*, 576 U.S. 237, 245, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015)); *see also Garlick v. Lee*, 1 F.4th 122, 129 (2d Cir. 2021) (defining the “core class” of testimonial statements as those involving (1) “*ex parte* in-court testimony or its functional equivalent that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”; (2) “extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; and (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” (quoting *Crawford*, 541 U.S. at 51-52)).

Landji contends that, under the Confrontation Clause, he was entitled to cross-examine the “technician who conducted the extractions.” (Landji Br. (Dkt. No. 638) at 38-39; Landji Reply Br. (Dkt. No. 648) at 16-18) In support of his Confrontation Clause claim, Landji cites *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), *Bullcoming v. New*

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Mexico, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), and *United States v. Hajbeh*, 565 F. Supp. 3d 773 (R.D. Va. 2021). (Landji Br. (Mt. No. 638) at 38-39; Landji Reply Br. (Dia No. 648) at 16-18) These cases all involve an effort to substitute a certification or affidavit for live testimony regarding the results of a laboratory or forensic examination. None of these cases is on point, because the proof here did not involve an effort to offer proof by certification or affidavit. Instead, the Government offered a witness with specialized knowledge concerning Cellebrite, a cell phone forensic tool, and that witness testified about his own observations concerning the Cellebrite extraction reports and the conclusions that he could draw from those reports.

In *Melendez-Diaz*, the defendant objected to the admission of “certificates of analysis” stating that certain evidence seized from the defendant contained cocaine. The Supreme Court held that the trial court’s admission of these “certificates” showing the results of a forensic analysis violated the defendant’s Confrontation Clause rights, and that the laboratory personnel who performed the analysis should have been required to testify in court regarding their findings. *Melendez-Diaz*, 557 U.S. at 307-09, 311. In so holding, the Supreme Court emphasized that the “certificates of analysis” “fall within the ‘core class of testimonial statements,’” because, *inter alia*, they were “solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact.” *Id.* at 310 (quotation marks and citation omitted). The Court also rejected the State’s analogy to certain records that were admissible at common law including “clerk[]

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certificate[s] authenticating an official record[] or a copy thereof” — noting that, unlike the certificates at issue in *Melendez-Diaz*, the clerk certificates did not provide any interpretation of the record, or “certify to its substance or effect.” *Id.* at 322.

Melendez-Diaz has no application here. That case involved an attempt to introduce the results of a laboratory analysis through a certification. Here, the Government offered live testimony from a witness with extensive experience in the use of Cellebrite and the cell phone extraction reports that it creates. As discussed above, the witness explained in detail why the extraction reports reflected data stored on the Defendants’ phones. Santos’s observations were based on, *inter alia*, his own comparison of the IMEI numbers contained on the cell phones and the extraction reports, the attribution data he found in the extraction reports, and his familiarity with the Cellebrite forensic tool and the extraction reports that Cellebrite generates. Defendants were free to, and did, cross-examine Santos regarding the bases for his conclusions.

In *Bullcoming*, the Supreme Court addressed the admissibility of a laboratory report certifying the results of a blood alcohol test. The analyst who certified the results did not testify. The prosecution instead offered the laboratory report through the testimony of an analyst who had not performed the test, but who was familiar with the process. *Bullcoming*, 564 U.S. at 651-52. The state court held that the report’s admission did not violate the Confrontation Clause because the certifying analyst

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“was a mere scrivener who simply transcribed the results generated by the gas chromatograph machine,” and the testifying analyst could testify regarding the machine and procedures used to perform the test. *Id.* at 657, 659-61 (quotation marks and citation omitted). The Supreme Court rejected this argument, noting that the analyst’s certification went beyond that of a scrivener because it addressed, among other things, (1) the integrity of the blood sample at issue, (2) that the sample number and the report number corresponded to each other, (3) that the analyst performed a particular test, and (4) that the analyst adhered to certain protocols in performing that test. *Id.* at 660. The Court also held that “surrogate testimony” of an analyst who had not certified the results of the test could not satisfy the Confrontation Clause because such an analyst “could not convey what [the certifier of the report] knew or observed about the events [the] certification concerned.” *Id.* at 661; *see also id.* at 663 (“[W]hen the State elected to introduce [the] certification, [the author of the certification] became a witness [the defendant] had the right to confront.”). The Court also rejected the State’s argument that the laboratory report was not “testimonial,” noting that the report included a “certificate concerning the results of [the] analysis” and that the certificate was “formalized in a signed document.” *Id.* at 663-65 (quotation marks and citations omitted).

Bullcoming is not on point for many of the same reasons discussed in connection with *Melendez-Diaz*. Unlike the laboratory analyst in *Bullcoming*, Santos was not certifying the accuracy of a forensic analysis performed

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by someone else. He did not make representations about the quality or the accuracy of the work performed by his counterpart in the Croatian National Police, Santos instead testified about his own knowledge of the Cellebrite forensic tool, the extraction reports it generates, and his own conclusions from his review of the extraction reports. He explained his reasons for concluding that (1) the cell phones belonged to the Defendants; (2) the extraction reports reflect data that were stored on the Defendants' cell phones; and (3) the evidence derived from the Defendants' cell phones was not altered or manipulated in any way. Santos's conclusions are not premised on the accuracy or quality of the forensic work done in Croatia. Accordingly, his testimony is not comparable to that of a laboratory worker affirming that a test conducted by another laboratory worker is accurate and properly performed.

Landji also cites *United States v. Hajbeh*, a child pornography case from the Eastern District of Virginia in which the prosecution, relying on Fed. R. Evidence 902, sought to authenticate images and videos obtained from the defendant's phones through the affidavits of two agents who performed extractions on the defendant's phones. *Hajbeh*, 565 F. Supp. 3d at 774-75. The court rejected the prosecution's effort to offer these images and videos through the agents' affidavits, finding that the affidavits were clearly testimonial and that their admission would "undoubtedly give rise to a Confrontation Clause issue." *Id.* at 776. In so ruling, the court noted that "the affidavits fill an important evidentiary . . . gap in this matter: namely, to establish that the [child pornography] exhibits are

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indeed portions of the contents of Defendant's iPhones." *Id.* (quotation marks and citation omitted). The court concluded that, in order to admit the images and videos, the prosecution would have to call the authors of these affidavits as witnesses. *Id.* at 777.

Her; by contrast, the Government offered live testimony from Santos, a witness with extensive expertise in Cellebrite, the forensic tool used to prepare the extraction reports. Because of his expertise with Cellebrite, the witness recognized the extraction reports as having been generated from the Cellebrite forensic tool. Because of his knowledge of Cellebrite and the extraction reports that it generates, and his knowledge of the unique identifying numbers associated with each cell phone, Santos could testify regarding whether the cell phones at issue belonged to Defendants; whether the extraction reports were derived from these cell phones; and the likelihood as to whether the data contained on these cell phones had been altered or manipulated. In doing so, Santos did not make representations about the accuracy or quality of the forensic work performed in Croatia, or any findings made by his counterpart in Croatia. *Cf. Bullcoming*, 564 U.S. at 661 ("[S]urrogate testimony of the kind [the surrogate witness] was equipped to give could not convey what [the certifying analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed.").

In sum, the admission of the cell phone extractions did not violate the Defendants' Sixth Amendment rights.

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* * * *

Because the extractions from the Defendants' cell phones were properly admitted under Fed. R. Evidence 901 and the Sixth Amendment's Confrontation Clause, Defendants' motions for a new trial on this basis will be denied.

2. Jury Selection

Landji and Adamu argue that they are entitled to a new trial because the venire and petit jury did not reflect a fair cross-section of the community, in violation of the Sixth Amendment and the Jury Selection and Service Act of 1968 (the "JSSA"), 28 U.S.C. § 1861. (Landji Br. (Dkt. No. 638) at 42-44; Adamu Br. (Dkt. No. 639) at 9-13)

a. Background

Jury selection began on October 6, 2021. On that day, the Defendants filed a joint letter "to advise the Court of a concern" that, "[b]ased on defense counsel's observations," the venire "significant[ly] underrepresent[s] . . . Black jurors." (Oct. 6, 2021 Jt. Ltr. (Dkt. No. 581) at 1-2) Counsel acknowledged that "the issue is not yet ripe" because additional potential jurors would be seated the next day to replace jurors who had been excused.¹⁸ (*Id.*) Jury selection

18. Because of COVID-19 safety protocols, jury selection took place in the Jury Assembly Room at 500 Pearl Street, and only 42 venire members could be examined at any one time. Because that number of venire members is inadequate to select a jury in a criminal case of this nature, jury selection proceeded over two

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continued on October 7, 2021, and Landji's counsel then challenged the racial composition of the venire. (Voir Dire Tr. 238) Landji's counsel complained that "about six of the 52 jurors appear to be black jurors, and that amounts to 11.5 percent of the venire." (Voir Dire Tr. 238-39) Counsel went on to argue that, based on the eligible jury population in the Southern District of New York, "there is between a 9 and 10 percent absolute disparity," which "raises a violation of the defendants' Sixth Amendment rights." (Voir Dire Tr. 239) Counsel requested that the venire "be struck until an appropriately representative venire can be composed." (*Id.*) This Court rejected this argument, citing its recent opinion in *United States v. Lawrence*, No. 21 Cr. 127 (PGG), which addressed similar arguments that Blacks and Hispanics are underrepresented in grand juries in this District. (Voir Dire Tr. 239-40; *see United States v. Lawrence*, No. 21 Cr. 127 (PGG), Dkt. No. 27. The Court then completed the jury selection process. (Voir Dire Tr. 240-45)

b. Applicable Law

"The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community." *Berghuis v. Smith*, 559 U.S. 314, 319, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010) (citation omitted). The JSSA provides that

days with excused venire members being replaced by new panel members.

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all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. . . [A]ll citizens shall have the opportunity to be considered for service on grand and petit juries . . . and shall have an obligation to serve as jurors when summoned for that purpose.

No citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status.

28 U.S.C. §§ 1861-62. Under the JSSA, a “defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of [the JSSA] in selecting the grand or petit jury.” 28 U.S.C. § 1867(a).

In *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), “[the Supreme] Court described three showings a criminal defendant must make to establish a prima facie violation of the Sixth Amendment’s fair-cross-section requirement”:

He or she must show: “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to

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the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”

Berghuis, 559 U.S. at 319 (quoting *Duren*, 439 U.S. at 364). “The *Duren* test ‘governs fair cross section challenges under both the [JSSA] and the sixth amendment.’” *United States v. Rioux*, 97 F.3d 648, 660 (2d Cir. 1996) (quoting *United States v. LaChance*, 788 F.2d 856, 864 (2d Cir. 1986)) (alteration in *Rioux*).

c. Analysis

Defendants contend that Blacks and Hispanics were underrepresented in the venire, and that statistics submitted to this Court in *United States v. Lawrence* demonstrate that Blacks and Hispanics are underrepresented in the overall Manhattan jury pool for this District. (Landji Br. (Dkt. No. 638) at 43-44 (citing *Lawrence*, No. 21 Cr. 127 (PGG), Dkt. No. 13-2 (Martin Decl.)); Adamu Br. (Dkt. No. 639) at 12 (citing *Lawrence*, No. 21 Cr. 127 (PGG), Dkt. No. 13-2 (Martin Decl.))) Defense counsel also complains that this District’s jury summons process is based on voter registration lists, and that Black people are “systematically underrepresented in voter registration lists as compared to the jury-eligible population.” (Landji Br. (Dkt. No. 638) at 43-44) Landji’s counsel further states that, as a result of the underrepresentation of Blacks and Hispanics in the venire, “only one Black juror and possibly one Hispanic juror” served on the jury. (Landji Br. (Dkt. No. 638) at 44)

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The Government argues that Defendants have not made a *prima facie* showing of underrepresentation under the second *Duren* prong, because their claims are premised on (1) their personal observations of the venire and petit jury in this case — an inadequate sample size; and (2) outdated statistics from 2017 that this Court previously rejected as insufficient in *Lawrence*. (Govt. Opp. (Dkt. No. 643) at 61, 63-65) The Government also argues that, under the third *Duren* prong, any underrepresentation of Blacks or Hispanics in the venire or petit jury is due to an external factor — namely, the different rates in voter registration across different races and ethnicities — and is not a feature of the jury selection process itself (*Id.* at 61, 65-66)

In *United States v. Lawrence*, this Court addressed the defendant's claim that this District's practices in creating the grand jury pool from voter registration lists cause the systematic exclusion of Blacks and Hispanics, in violation of the Sixth Amendment and the JSSA. *United States v. Lawrence*, 553 F. Supp. 3d 131 (S.D.N.Y. 2021). Lawrence argued that (1) the "master list" of eligible jurors is created from voter registration rolls, "which underrepresent jury-eligible Black and Latino New Yorkers," (2) the master list is only "refill[ed] . . . every four years," which arbitrarily excludes 18-21 year olds from the prospective jury pool and disproportionately impacts Black and Hispanic voters, (3) the District removes inactive voters from the list, which also disparately impacts Black and Hispanic voters, and (4) the jury administrator did not reach out to prospective jurors who did not receive or respond to questionnaires that are used to determine

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juror eligibility. *Id.* at 143-44 (quotation marks and citations omitted). This Court rejected these arguments, holding that such practices “are facially neutral” or are the result of factors external to the jury selection process. *Id.* at 144-46. Concluding that Lawrence had not shown any systematic underrepresentation under the third *Duren* prong, this Court denied his motion to dismiss the indictment. *Id.* at 146.

Defendants in the instant case raise the same arguments and rely on the same statistical study regarding the Manhattan jury pool that this Court considered and rejected in *Lawrence*. Neither Defendant has made a meaningful effort to distinguish *Lawrence*, however, or to explain why this Court should rule differently here. (Landji Br. (Dkt. No. 638) at 43-44 (citing *Lawrence*, No. 21 Cr. 127 (PGG), Dkt. No. 13-2 (Martin Decl.); Adamu Br. (Dkt. No. 639) at 12 (citing *Lawrence*, No. 21 Cr. 127 (PGG), Dkt. No. 13-2 (Martin Decl.)))

For the reasons explained in *Lawrence*, 553 F. Supp. 3d at 142-46, this Court concludes that Defendants have not made a sufficient showing of systematic underrepresentation of Blacks and Hispanics under the *Duren* test.¹⁹ To the extent that Defendants’ motion for a new trial is premised on that claim, their motion will be denied.

19. With respect to Landji’s argument that “only one Black juror and possibly one Hispanic juror” served on the jury (Landji Br. (Dkt. No. 638) at 44), the Court notes that defense counsel exercised a peremptory challenge as to a Black female juror, and asked that another Black panel member be excused for cause. (*See Voir Dire Tr.* 233-37, 241-45)

*Appendix B***3. The Presence of the Cocaine Evidence at Trial**

Landji argues that he is entitled to a new trial because the package containing the alleged cocaine recovered from the Gulfstream II — GX 101 — was in the courtroom during trial until the Court ruled that the alleged cocaine was inadmissible because of a lack of evidence concerning chain of custody. (Landji Br. (Dkt. No. 638) at 40-42; *see also* Tr. 429-41 (bench ruling excluding purported cocaine on chain-of-custody grounds))

a. Background

On October 11, 2021 — the day before opening statements and long after the September 16, 2021 deadline for filing motions *in limine* (*see* Dkt. No. 536; *see also* Dkt. No. 467) — Landji moved to exclude the alleged cocaine (GX 101) recovered from the Gulfstream II. (Oct. 11, 2021 Jt. Def. Ltr. (Dkt. No. 583) at 1-2) In support of his motion, Landji cited the 20-month break in the chain of custody from October 31, 2018 — when the Croatian National Police officers who had recovered the alleged cocaine delivered it to Inspector Ivica Sestak of the Croatian National Police (Tr. 149, 185) — to June 24, 2020, when DEA Special Agent Kohut took custody of the alleged cocaine from Sestak (Tr. 99-100, 206, 210). (Oct. 11, 2021 Jt. Def. Ltr. (Dkt. No. 583) at 1)

The Court reserved decision on Landji's application (Tr. 49-55), and the parties proceeded to opening statements. During Landji's opening, counsel conceded that the Croatian National Police had recovered a

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kilogram of cocaine from Landji's Gulfstream II. Counsel told the jury that Cardona-Cardona had "smuggled a kilo of cocaine onto Mr. Landji's plane without Mr. Landji's knowledge"; that the jury was "going to see a kilogram of cocaine"; that "[a] lab analyst will explain that . . . it is indeed cocaine"; and that "[w]e're not disputing that. We're not denying it. That is real, hard evidence." (Tr. 66, 68)

After opening statements, Officer Tomislav Milunic of the Croatian National Police testified about the arrest of Landji and Adamu and the subsequent search of Landji's Gulfstream II. (Tr. 139) Milunic testified that Croatian police recovered a white plastic bag with red and yellow markings in the cargo area of the plane. (Tr. 141-43) Inside the white bag was a black bag, and inside the black bag was a rectangular package wrapped in brown tape. (Tr. 142-43) Milunic testified that the package contained "a white powder substance with characteristics of cocaine." (Tr. 143) Milunic identified GX 102 and GX 103 as — respectively — the original packaging of the alleged cocaine and the Croatian lab packaging of the alleged cocaine. (Tr. 143-44, 149-57, 179-85) Although the prosecutor showed GX 101 to Milunic during his testimony, he was not questioned about this exhibit. (Tr. 143) During Milunic's testimony, the Government introduced certain photographs taken by Croatian police officers; the photos show the white powder substance, its packaging, its weight, and the location on the plane where the package was found. (Tr. 145-47; GX 223-234)

Agent Kohut testified after Milunic. Kohut testified that he received "just under one kilogram of cocaine and some packaging" from Inspector Sestak in Zagreb on

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June 24, 2020. (Tr. 210; *see also* Tr. 211 (“I received a white powdery substance in a sealed Ziploc bag that was contained within some brown wrapping. I also received some other bags and packaging that was contained in some brown paper wrapping. . . . [O]ne of [the bags] had some markings on it, labeling, indicating that it had come from a forensic examination center in Zagreb.”)) Kohut identified GX 101 as “the evidence bag in which I sealed the cocaine that I received on the 24th of June in Zagreb, Croatia.” (Tr. 214; *see also* Tr. 215) Kohut identified GX 102 and 103 as packaging for GX 101. (Tr. 215-19, 227-28)

As discussed above, during the cross-examination of Agent Kohut, defense counsel introduced two DEA Form 7 reports stating that a package containing 992.23 grams of cocaine hydrochloride had been recovered from Landji’s Gulfstream II aircraft at Zagreb International Airport. (DX AAA, DX BBB)

On October 18, 2021, in the midst of trial, this Court granted Landji’s motion to exclude GX 101, ruling that “the [G]overnment has not offered an evidentiary foundation sufficient to demonstrate that the white powder found by the Croatian National Police on October 31, 2018 at the Zagreb airport is the same powder that has been marked as Government Exhibit 101.” (Tr. 429-41)

After the Government rested (Tr. 899), counsel for Landji and Adamu requested that the Court give the following instruction to the jury:

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You heard reference in Special Agent Kohut's testimony to an item received from the Croatian National Police and sent to a DEA laboratory. I caution you that there is no evidence in the record establishing that that item was recovered during the search of the aircraft. Nor is there any evidence of testing of that item to determine whether it is or is not a controlled substance. With respect to this item, I remind you of my instruction that to the extent the parties marked an exhibit for identification, but the exhibit was not received into evidence, it should not enter into your deliberations and you may not consider it in any way.

(Tr. 949)

Landji's counsel commented that he had "wrestled" with whether to request such an instruction, because "this is one of those situations where as a defense attorney you question [whether you] want to draw attention to this or not." (Tr. 945; *see also* Tr. 947-48, 952)

In response to counsel's remark, the Court shared its perspective concerning the proposed instruction:

There was a clear plastic DEA evidence bag in the courtroom on the government table for some period of time. Within that clear plastic DEA evidence bag there was a white opaque plastic bag, which allegedly contained the powder that allegedly is cocaine. But having examined the

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bag closely myself, honestly, you couldn't tell what was in the bag. The powder itself was not visible because it was enclosed within an opaque white plastic bag.

So while it's true that the evidence bag was in the courtroom for some period of time, and it was sitting on the government's desk for several days, I suspect, I am not sure that anybody focused on it.

So what I am telling you, for what it's worth, from my perspective, the presence of that bag in the courtroom seems innocuous to me, and I'm not sure anyone even remembers that it was here at this point because a lot of time has gone by since we heard from these witnesses from Croatia.

So, from my perspective, and of course it's ultimately defense counsel's decision, from my perspective, to draw the jury's attention to the fact that the bag was in the courtroom at an earlier point in the trial, I am not sure that that is in the interest of the defendants.

(Tr. 946)

The Government objected to defense counsel's proposed curative instruction, because it incorrectly stated that there was no evidence that cocaine had been recovered from the Gulfstream II aircraft. (Tr. 949-51)

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The Government noted that the defense had offered “two DEA evidence documents” — DX AAA and DX BBB — stating that a package containing 992.23 grams of cocaine had been recovered from the Gulfstream II aircraft after it landed in Zagreb. (Tr. 949-51) Defense counsel then acknowledged that the Government “may be right that those exhibits require some modification of the language [defense counsel had requested].” (Tr. 951) The Court took a recess to permit counsel to consider the matter more fully. (Tr. 953) When defense counsel returned from the recess, they informed the Court that they were “going to withdraw our request for the instruction.” (Tr. 956)

During his summation, Landji’s counsel reminded the jury that Milunic had testified that he tested the white powder found on the Gulfstream II, but that

he did not tell you what the result of that test was. So you don’t know what the result was, and you don’t know whether that was, in fact, cocaine. Nor did the government ever present you with the cocaine that was found on the plane. In fact, in this drug case, strangely, there are no actual drugs in evidence.

(Tr. 1035)

Landji’s counsel also addressed the concession in the defense opening that the Gulfstream II had contained a kilogram of cocaine (Tr. 1035-36):

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. . . we were not in a position to dispute that because Mr. Landji did not know, and does not know, anything about these drugs. But as it turns out, the government didn't actually do their job of showing you the drugs that were supposedly discovered on the plane.... The test result, as I said, is not in evidence. There is no forensic proof in this case that what is depicted in these exhibits was actually determined forensically to be cocaine. The government's investigation was inadequate because, of course, they relied exclusively on Cardona. But getting back to the white powdery substance that was found, whether or not it tested positive for cocaine, this item was actually found on the plane. We are not disputing that. You could see it for yourself in the photos and you heard about it in the testimony.

(Tr. 1036)

While the defense conceded that a package containing a "white powdery substance" had been recovered from Landji's Gulfstream II aircraft, Landji and Adamu argued to the jury that someone else had planted the "cocaine" or "drugs" on Landji's plane without their knowledge. (*See, e.g.,* Tr. 1006, 1014-15, 1037, 1049-51, 1067, 1082-85)

By contrast, the theme of the Government's summation and rebuttal was that the jury need not conclude that the Defendants possessed cocaine in order to find the Defendants guilty of the charged narcotics conspiracy.

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(Tr. 962-63 (“You know there was cocaine on that plane, but let me be clear, even without that test shipment, even if that test shipment flight had never occurred or even if the defendants somehow did not know what was on board that test flight, the defendants still would be guilty. That is because they conspired for years about how to ship massive amounts of cocaine by plane. That is because they agreed to ship ton after ton of cocaine on the airplane. That is enough because they are charged with a conspiracy, which is just an agreement”); Tr. 985 (“[E]ven if the defendants didn’t actually know there were drugs on board the plane at this time, or even if there weren’t actually any drugs on board the plane when it landed in Croatia, it doesn’t matter. The defendants are still guilty.”); Tr. 1107 (“But you don’t need that flight to find the defendants guilty because they had made an agreement prior to that flight to distribute and possess with the intent to distribute tons of cocaine on board U.S. registered aircraft, aircraft owned by a U.S. citizen, and an aircraft on which a U.S. citizen would be present,”); Tr. 1108 (“Assume for a moment that the test kilogram was not actually on board the aircraft. The point of that flight was really not the single kilogram. The cost of the flight alone exceeded that. That flight was proof of concept. The purpose of that flight was to convince the potential buyers in Europe that Cardona and Fofana and Landji and Adamu could do what they said they would do and traffic drugs using that plane and others.”))

In the jury charge, this Court instructed the jury that “[t]he only exhibits that are evidence in this case are those that were received in evidence. Exhibits marked for identification but not admitted are not evidence. . .” (Tr.

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1124) An index reflecting all exhibits that were admitted into evidence was also provided to the jury. (Tr. 1156-57) As set forth above, GX 101 was not received in evidence.

b. Analysis

Landji argues that the presence of GX 101 in the courtroom was unfairly prejudicial because it “suggest[ed] that it was in fact the cocaine recovered from the plane.” (Landji Br. (DIU. No. 638) at 40) This argument fails for numerous reasons.

As an initial matter, in Landji’s opening, counsel conceded that a kilogram of cocaine had been recovered from Landji’s Gulfstream II. (Tr. 68)

Moreover, as discussed above, defense counsel introduced exhibits stating that the package recovered from Landji’s Gulfstream II contained 992.23 grams of cocaine hydrochloride. (Tr. 229-33, 23 8-40; DX AAA, DX BBB)

And, as the Court noted, the package that for a time sat on the Government’s counsel table revealed only an opaque white plastic bag. No white powder was visible, (*See* Tr. 946 (“[Y]ou couldn’t tell what was in the bag. The powder itself was not visible because it was enclosed within an opaque white plastic bag. . . . [T]he presence of that bag in the courtroom seems innocuous to me, and I’m not sure anyone even remembers that it was here at this point because a lot of time has gone by since we heard from [the Croatian] witnesses. . . .”)) Landji’s counsel

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echoed the Court's observations, stating that he did not want to "draw attention" to GX 101 through his proposed instruction. (Tr. 945; *see also* Tr. 947-48 (stating that the Court had presented "one side of our thinking" as to whether a curative instruction would draw attention to the alleged cocaine)) As discussed above, Landji's counsel ultimately withdrew his request for a curative instruction concerning GX 101. (Tr. 956)

Given this record, Defendants have not demonstrated that they suffered unfair prejudice as a result of the presence of GX 101 in the courtroom during part of the trial.

Indeed, the Government's inability to introduce GX 101 worked to its detriment. In the defense summations, counsel emphasized that no cocaine had been received in evidence. (Tr. 1035-36) And, as noted above, this Court instructed the jury that it could consider only exhibits that had been received in evidence. (Tr. 1124) There is no reason to believe that the jury did not follow this instruction. *See United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994) ("[J]urors are presumed to follow instructions from the court." (citing *United States v. Gilliam*, 994 F.2d 97, 100 (2d Cir. 1993))); *United States v. Taveras*, 584 F. Supp. 2d 535, 541 (E.D.N.Y. 2008) ("[W]e normally presume that a jury will follow an instruction. . . ." (quotation marks and alteration omitted) (quoting *Greer v. Miller*, 483 U.S. 756, 767 n.8, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987))).

In sum, the presence of GX 101 in the courtroom for part of the trial did not deprive Defendants of a fair trial.

*Appendix B***4. Conditions of Confinement**

Landji contends that he is entitled to a new trial because — as a result of the conditions of his confinement — he was denied a meaningful opportunity to participate in his defense. Landji complains that (1) at points during the trial he temporarily did not have access to his legal documents and discovery materials; and (2) on certain trial days he did not receive breakfast.²⁰ (Landji Br. (Dkt. No. 638) at 44-45)

Landji and Adamu were housed at the Metropolitan Correctional Center (the “MCC”) when jury selection began on October 6, 2021. On October 13, 2021, in the midst of trial, defense counsel informed the Court that the MCC was shutting down, and that Landji and Adamu would be moved to the Metropolitan Detention Center (the “MDC”). (Tr. 222-23) Defense counsel also informed the Court that, in anticipation of the move to the MDC, the Bureau of Prisons (“BOP”) had packed all of the Defendants’ belongings, including their legal papers. (Tr. 223-24) This Court directed the Government to contact the BOP to ensure that the Defendants’ legal papers were returned to them, and the Government assured the Court that it would look into the matter promptly. (Tr. 223-25)

The next day — October 14, 2021 — the jury did not sit, but the Court met with the parties. (*See* Tr. 296) At that conference, Landji’s counsel informed the Court that the Defendants had not yet been moved to the MDC because of

20. At trial, the Court sat from 9:30 a.m. to 2:30 p.m. (Tr. 29)

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a “security issue.” Landji’s counsel stated that Landji “has one envelope of legal papers,” but that certain “discovery materials” had not yet been returned to him. (Tr. 315) The Government stated that it had made arrangements for the Defendants’ legal papers to be returned to them when they arrived at the MDC. The Government stated that it would seek to determine when the Defendants would be moved to the MDC, and whether Defendants’ legal papers could be returned to them while they remained at the MCC. (Tr. 316-17) Adamu’s counsel responded that Adamu’s legal papers had already been returned to him, and Landji’s counsel stated that he expected that Landji’s remaining legal papers would be returned to him that day. (*See* Tr. 317-18)

Later that day, Landji’s counsel submitted a letter stating that Landji had not received breakfast or lunch “on any of the trial days” due to a staffing shortage at the MCC. (Oct. 14, 2021 Landji Ltr. (Dkt. No. 592)) The letter stated that the lack of food “compromises [Landji’s] ability to focus during the trial and meaningfully participate in his own defense.” (*Id.*) This was the first time Landji’s counsel had raised an issue concerning Landji’s access to food.

The following day — October 15, 2021 — Landji’s counsel informed the Court that “the issue[s] of the paperwork and the food . . . with everyone working together . . . are getting resolved.” (Tr. 320) The parties did not raise any issue regarding these matters over the next several days.

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On October 18, 2021, Adamu’s counsel informed the Court that the Defendants would be moving to the MDC that night and that “a good majority of their legal papers have been left behind.” (Tr. 441) Counsel stated that he would submit a proposed order later that day “in reference to trying to get those legal materials over to MDC.” (*Id.*) No such proposed order was ever submitted to the Court, however, and Defendants did not make any complaint regarding access to legal papers for the remainder of the trial.

On October 21, 2021, in discussing whether the Defendants could be brought to court by 9:00 a.m. (rather than 9:30 a.m.), Landji’s counsel reported that “the MDC[] . . . [does not] serve breakfast until 8:00, and if [the Defendants] are being prepared to be transported here on the early side, . . . the MDC simply skips breakfast,” (Tr. 928) The Court directed the Government to coordinate with the BOP to ensure that Defendants received breakfast. (Tr. 929)

On October 22, 2021, prior to closing arguments, Landji’s counsel informed the Court that his client was “not given breakfast” that day. (Tr. 956) Adamu’s counsel likewise reported that Adamu had not been given breakfast that day. (*Id.*) The Court offered Defendants granola bars, and the Marshals permitted Defendants to eat food they had brought with them for lunch. (Tr. 956-57)

The Government argues that neither the occasional lack of breakfast, nor Landji’s temporary lack of access to some of his legal documents, denied Landji a meaningful

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opportunity to participate in his defense, (Govt. Opp. (Dkt. No. 643) at 68-69) While the Government acknowledges that Landji faced “certain challenges during trial” — given the pandemic and the closure of the MCC — the Government contends that Landji has not “identif[ied] with any particularity how his ability to participate in his defense was actually curtailed.” (*Id.* at 68)

This Court finds that Landji’s occasional lack of breakfast, and his occasional lack of access to his legal papers, did not deprive Landji of a fair trial. The record shows that when defense counsel raised issues regarding food or access to legal papers, the Court directed the Government to work with the BOP to address these issues, and those issues were resolved. (*See* Tr. 223-25, 316-18, 320, 441, 929-30, 956-57) While it is regrettable that Landji sometimes missed breakfast, and occasionally did not have continuous access to his legal papers, there has been no showing that these issues deprived Landji of his right to assist in his defense.

To the extent that Landji argues that he is entitled to a new trial because the conditions of his confinement prevented him from meaningfully participating in his defense, Landji’s motion for a new trial will be denied.

CONCLUSION

For the reasons stated above, Defendants’ motions for a judgment of acquittal under Fed. R. Crim. P. 29, or for a new trial under Fed. R. Crim. P. 33 (Dkt. Nos. 638-39), are denied.

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Dated: New York, New York
June 27, 2022

SO ORDERED.

/s/ Paul G. Gardephe
Paul G. Gardephe
United States District Judge

**APPENDIX C — EXCERPT OF TRANSCRIPT OF
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK,
FILED OCTOBER 28, 2021**

[775]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

18 Cr. 601 (PGG)

UNITED STATES OF AMERICA,

v.

JEAN-CLAUDE OKONGO LANDJI
AND JIBRIL ADAMU,

Defendants.

Trial

New York, N.Y.
October 21, 2021
10:00 a.m.

Before: HON. PAUL G. GARDEPHE, District Judge

[776](Trial resumed; jury not present)

THE COURT: I have been told that Juror No. 1 suffered a stroke and is in the hospital, so we will not be able to proceed with her. We will have to proceed without her given the stroke she has suffered and the fact that she's hospitalized.

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I'm going to address defendants' renewed objections to the cell phone extraction evidence. Defendants have renewed their objection to evidence regarding extractions made from their cell phones. The extractions were performed by an employee of the Croatian National Police, but the government seeks to introduce this evidence through Enrique Santos, an investigative analyst at the U.S. Attorney's Office who has been trained in the technology used to perform extractions from cell phones. I addressed this issue in an October 14, 2021, bench ruling, which is at trial transcript 310 through 311. I will update that ruling to include the trial testimony up to this point.

Just before we broke yesterday, October 20, 2021, Enrique Santos testified regarding the proposed cell phone extraction evidence. Mr. Santos testified in a manner that was generally consistent with the government's proffer which underlaid my bench ruling.

Mr. Santos testified that he is trained in the use of the forensic tool that was used to perform the extractions [777]here. That tool, which is known as Cellebrite, is used to "perform forensic examination of mobile devices, such as cell phones." Trial transcript 727-28. During his employment at the U. S. Attorney's Office, Santos has used the Cellebrite forensic tool "every single day since 2014," and he has performed more than 2,000 cell phone extractions during his time at the U.S. Attorney's Office. Mr. Santos has also analyzed cell phone extractions performed by others and has done so on approximately 50 earlier occasions. Citing the trial transcript 729, 747.

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Santos testified that the Cellebrite software has “different profiles built in” based on a phone’s “make and model,” as well as “very specific versions of IOS or Android” operating systems. These profiles “will have very specific capabilities for defeating certain security patches” and “the ability to unlock certain cell phone models if they are locked” and “the ability to perform different types of extractions on each cell phone.” Citing the trial transcript 747-48. “Like any software, [Cellebrite] is constantly evolving,” as cell phones evolve and introduce new security features. Citing trial transcript 748-49.

Santos described as follows the three steps for performing a cell phone extraction using the Cellebrite software technology:

First, the user of the Cellebrite software “selects [778]the profile” in Cellebrite that matches the phone, “selects the type of extraction to perform,” “connects [the phone] to a computer or some other forensics tool, and then downloads whatever data possible off of the phone.” Citing the trial transcript 730 and 748. This process creates a “forensic image which is referred to as the gold master.” Citing the trial transcript at 730.

Santos further testified that once the forensic image is created through the Cellebrite software, it cannot be altered. *Id.* at 732. The process of creating the forensic image through this software also does not permit the user of the software to alter the information in the forensic image. *Id.* at 750. Someone in possession of the cell phone could, of course, “manipulate the data on

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the phone” prior to the acquisition, that is, prior to the creation of the forensic image. *Id.* If the data on the phone were manipulated or altered in some fashion prior to the extraction, for example, by “sending a message or placing a call,” “in most cases [an analyst] would see a timestamp when a message was sent or the call was placed. This information would appear on the extraction report and would thus reveal the manipulation or alteration.” *Id.*

In this fashion, the Cellebrite forensic tool assists in maintaining a cell phone in “the state in which the phone was in when [law enforcement personnel] received it,” by [779]preventing law enforcement from “altering any data on the phone” by “sending out any new messages or receiving new messages or [by] accidentally deleting anything or accidentally changing any timestamps.” *Id.* at 731-732.

The second step in the process of creating the extraction reports is a “analysis” which entails “pulling out the data that was recorded and sorting it out into different parts. For example, all the different chats would be put together, all the different images, the videos, web browsing history, and the like.” *Id.* at 732.

The third and final step involves “creating a report that gets turned over to a prosecutor or agent.” *Id.* at 731. At this stage in the extraction process, a user “can never modify the content of a message” or “edit anything” within the report. A user of the Cellebrite software can, however, “exclude certain items from a report,” as either “entire categories of data or very specific records.” In his

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testimony, Mr. Santos used the example of a limitation imposed by a search warrant. *Id.* at 752.

As to how we can be sure that the extraction report matches up to a particular cell phone, Santos testified that every cell phone has a “unique identifying number,” which is referred to as a “international mobile equipment identifier,” or “IMEI” that is “recorded as part of the extraction.” This allows for a specific phone to be matched to extraction output. [780]*Id.* 733.

Here, Santos analyzed the forensic images and extraction reports prepared by the Croatian National Police from the defendants’ cell phones. As part of his analysis, he matched the phones to the extractions using the IMEI numbers that are included in the reports and engraved or printed on the phones. *Id.* 729, 736-38.

Santos determined that the forensic images were created in approximately January 2019 using the Cellebrite software, and that the images could not have been altered after they had been created. *Id.* 738 and 749. Santos described the technological capabilities of Cellebrite in 2019, testifying that one could “recover a lot of the data that’s commonly stored on these phones” at the time, including “call histories, messages, photos, videos, web browsing history, notes, voice messages, that type of data.” *Id.* 749.

Santos also testified that “the size [of data] of the underlying [forensic] image” matched the size of the data of the extraction report generated from that forensic image

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for the phones in this case. Based on that comparison, he determined that the extraction reports contained the contents of the forensic images. *Id.* 754.

Based on Santos' testimony, the government seeks to introduce the hard drive containing the extracted data, the extraction reports, and certain excerpts of the material [781]extracted from the defendants' cell phones.

While defendants concede that Santos' testimony "lays a foundation that the [extraction] report matches the forensic image in this case," *Id.* 755, defendants object to the admission of this evidence, arguing that Santos "cannot testify that the forensic image is what it purports to be, which is a copy of the data on the phone." *Id.* 757. Because "certain data can be excluded" from the extraction report, defendants argue that exculpatory information could have been left out of the report, and that it is impossible to know if "any steps were taken to ensure that the data on the phone is accurately reflected in the forensic image." *Id.* 759, also 740-742. In sum, defendants argue that because Santos did not perform the extractions himself, he cannot know "whether the entirety of the data [on the phone] or the bulk of the data" has been extracted. *Id.* 756.

As I noted, defendants previously moved *in limine* to exclude these exhibits based on the same arguments made yesterday, contending that because Santos did not perform the extractions himself, he cannot testify that the "extractions are complete, unaltered, and accurate copies of the data actually contained on the defendants'

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phones.” See October 13, 2021, defense letter, Dkt. No. 586, at pages 3 to 4.

In the October 14, 2021, bench ruling, I concluded that “while Mr. Santos did not perform the extractions from the [782]defendants’ cell phones himself, as a result of his expertise in the forensic examination of cell phones, he can testify that (1) Government Exhibits 500A, 500B, and 500C are reports concerning the extraction of data from cell phones; (2) the extraction reports are forensic images that were created through the use of Cellebrite, the software tool with which Santos is familiar; (3) Cellebrite creates an exact copy of data from cell phones, and the images this program contains are not subject to editing or alteration; (4) each cell phone has an IMEI number which is unique; (5) each of the three cell phones at issue has an IMEI number that Santos has identified; (6) the forensic image created by the Cellebrite software reveals the IMEI number for the source cell phone; and (7) by comparing the IMEI numbers, Santos has matched each of the forensic reports with one of the cell phones.” *Id.* 310-311.

Santos’ testimony up to this point is generally been consistent with the government’s proffer, with the exception of whether Cellebrite creates an exact copy of the data from the cell phone. Mr. Santos’ testimony indicates that the Cellebrite software may not have resulted in an exact copy of data from the cell phones and that certain material on the cell phones may not have been reproduced in the forensic image.

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I conclude that the fact that some data may not have been extracted from the defendants' phones does not compel a finding that the forensic images are not what they purport to [783]be -- a compilation of data from the phones. The jury will not be misled on this point because the government "will not represent to the jury that the images it presents reflects everything that is on the defendants' phones." *Id.* 309.

As to the possibility that the data on the phone was manipulated prior to creation of the forensic image, or that the extraction report itself was manipulated, I note that Santos has testified that (1) to the extent that data on the phones was manipulated prior to extraction, any such manipulation would likely be revealed on the extraction report because of the timestamp feature; (2) once the forensic image is created, it's not possible to alter its contents or to edit its contents; and (3) the data size of the forensic image matches the data size of each extraction report, indicating that each extraction report reflects all of the data contained in the forensic image. *Id.* 750, 754.

In addition to the testimony we have heard so far, as I noted in the October 14, 2021, bench ruling, *Id.* 310-311, the government's earlier proffer indicates that there will be ample evidence that the material extracted from the phones is, in fact, associated with the defendants. This material includes, among other things, references to the defendants, photos of them, and email addresses associates with them. *Id.* 31-311.

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Given the entire record concerning this issue, I see no reason to alter the conclusions set forth in the October 14, [784]2021, bench ruling. In light of the low threshold for authenticity that applies pursuant to Federal Rule of Evidence 901, I conclude that defendants' objection, which at bottom is that the extraction reports may not reflect all the data on the defendants' phones, goes to the weight of this evidence and not to its admissibility. Accordingly, the cell phone extraction evidence will be admitted.

I will point out for the record that this is the latest in a series of legal issues that the government could have avoided. As Mr. Biale pointed out yesterday, it is inexplicable that the government did not obtain a search warrant for defendants' phones years ago and have Mr. Santos perform the extractions himself, which is what he does, what he testified he has done at the U.S. Attorney's Office "every single day" since 2014. *Id.* 729. This follows the equally inexplicable failure to arrange for a taint team to review the documents seized from the defendants at the time of their extradition and the failure to ensure chain of custody as to the drug evidence.

Over and over again the government's handling of the evidence in this case has created legal issues that were entirely avoidable, and although defendants have been in custody for three years, most of these issues did not come to a head until shortly before or during trial, which has significantly disrupted these proceedings, which are already [785]quite challenging given the COVID-19 protocols, the closing of the MCC, and the repeatedly delayed production of the defendants from the MDC.

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All right. Is there anything counsel want to say before we get the jury?

MR. BIALE: No, your Honor. But in light of the Court's ruling, can we just have a moment to confer among defense counsel about how to handle the remainder of Mr. Santos' testimony before the jury comes in?

THE COURT: Yes.

(Counsel confer)

THE COURT: I'm going to step off the bench for just a minute, but I'll be right back.

(Recess)

MR. BIALE: OK, your Honor. We're good to go.

THE COURT: All right.

(Continued on next page)

[898](At sidebar)

MR. BIALE: So I just wanted to do this. I wasn't sure if I needed to do this before the government rested, so that's why I jumped up. We renew our motion to exclude the cell phone evidence under Rule 901 based on the testimony that Mr. Santos gave on cross-examination.

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In particular with respect to the iPhone, what he said is that where the IMEI is located on the iPhone can be taken out and replaced. He doesn't know what happened with the physical phones between the time they were seized from the defendants and when the extraction was conducted.

In addition, with respect to all the phones, he never examined the contents of the phones themselves or the forensic image to compare and make sure that that PDF document that he reviewed matches them. He testified that PDF documents are easily manipulable, and he further testified that the fact that the size of the data matches doesn't tell you anything about whether the actual data in substance is the same.

So we renew our objection.

THE COURT: Your motion's denied.

MS. CISTARO: We join in that objection.

THE COURT: Your motion is denied.

The objection, as I previously indicated, in my judgment, goes to the weight of the evidence rather than the admissibility. It's all completely appropriate for [899] cross-examination, and counsel made his points. But I continue to believe that the objections go to the weight of the evidence rather than the admissibility.

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I will also comment that having sat through this for three and a half hours, or thereabouts, it was really quite tedious, and how much of this the jury really absorbed I really have a question about. Frankly, I view the evidence as quite marginal in terms of its significance to the jury. I believe the case is going to turn on the jury's estimate of Mr. Cardona's credibility, which is also how counsel pitched the case to the jury in opening, and I believe that remains true today.

So do you have any other evidence, Mr. Hellman?

MR. HELLMAN: We're prepared to rest.

THE COURT: OK. Are you prepared to proceed?

MR. BIALE: Yes. We had three stipulations we're going to read, and we have one exhibit that we've stipulated to authenticity. We have not stipulated to admissibility. So I will be offering that exhibit.

THE COURT: All right.

MR. DUNN: Your Honor, we don't have anything to offer.

THE COURT: OK. I had provided to the parties yesterday evening the first 22 pages of the charge. I have not given them the rest of it, but I'm prepared to do that in

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**APPENDIX D — EXCERPT OF TRANSCRIPT OF
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK,
FILED OCTOBER 28, 2021**

[295]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

18 Cr. 601 (PGG)

UNITED STATES OF AMERICA,

v.

JEAN-CLAUDE OKONGO LANDJI
AND JIBRIL ADAMU,

Defendants.

Trial

New York, N.Y.
October 14, 2021
9:30 a.m.

Before: HON. PAUL G. GARDEPHE, District Judge

[303]each other, figure out whether there is an issue. If there is an issue, tee it up for me, and I'm happy to rule on it. But don't send me things that tell me nothing, because it's just not helpful. OK?

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MR. DUNN: Yes, Judge. I have no excuse to offer to the Court, and I'll discuss this with the government.

THE COURT: OK. I am going to address this morning the issue that's been raised about the phone extraction.

The government seeks to introduce cell phones seized from the defendants at the time of their arrest in Zagreb. The phones have been marked as Government Exhibits 104, 105, and 106, along with extraction reports from the cell phones, which have been marked as Government Exhibits 500A, 500B, and 500C. Citing the government's October 13, 2021, letter, Dkt. No. 585.

Government Exhibit 104 is an Apple iPhone 7 Plus, Government Exhibit 105 is a Samsung Galaxy S9+, and Government Exhibit 106 is a Samsung Galaxy J7 phone. *Id.* at page 3. The government proposes to introduce these exhibits through Enrique Santos, an investigative analyst and mobile phone forensics examiner employed by the U.S. Attorney's Office. Although the government's letter indicates that Mr. Santos is highly skilled in the extraction of data from cell phones, he did not extract material from the defendants' cell phones. Instead, the extractions were performed by law enforcement personnel in Croatia who stored the extractions from defendants' cell phones [304] on a hard drive and then provided the hard drive to U.S. authorities.

Mr. Santos reviewed the hard drive, which is Government Exhibit 500, and he's prepared to testify that certain material on the hard drive was extracted from the

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defendants' cell phones. *Id.* at pages 3-4. The defendants object to Mr. Santos' proposed testimony, arguing that he is not competent to testify about the extraction reports because he did not perform the extractions himself. Defendants further assert that the admission of his testimony would present "potential Confrontation Clause issues." Citing the October 11, 2021, defense letter, Dkt. No. 583, at page 2.

In an October 13, 2021, letter, the government proffers the following concerning Mr. Santos' proposed testimony:

1. Santos reviewed the contents of the hard drive, Government Exhibit 500, as well as Government Exhibit 500A, 500B, and 500C, which are each extraction reports, which Santos recognizes to be an extraction of data from cell phones. From the extraction reports, Santos can tell that the extraction reports are forensic images created with a software tool known as Cellebrite, C-e-l-l-e-b-r-i-t-e, which creates an exact copy of data from a cell phone. Santos will also testify that the Cellebrite software creates images that are not subject to editing or alteration.

[305]2. Each cell phone has a unique identifying number referred to as an IMEI number. No two cell phones share the same IMEI number.

3. When reviewing Government Exhibit 500A, Santos located an IMEI number in an area of the forensic image containing other unique identifiers of the source phone.

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When reviewing Government Exhibit 104, the Apple iPhone 7 Plus, Santos located an IMEI number, which is physically engraved on the SIM card tray of the phone.

5. The IMEI number that Santos observed in the data set forth in Government Exhibit 500A is from an Apple iPhone 7 Plus and that IMEI number matches the IMEI number engraved on Government Exhibit 104.

In reviewing Government Exhibit 500A, Santos found evidence demonstrating that the cell phone's own and user is defendant Landji. This evidence includes user accounts associated with the phone which reference Landji's name and his business, Okland Aviation. The phone also contains numerous selfies that show Landji, as well as chats in which Landji identifies himself. *Id.* at pages 4-5.

The government has proffered similar information as to the other two phones:

1. When reviewing Government Exhibit 500B, Santos located an IMEI number in an area of the forensic image containing other unique identifiers of the source phone.

[306]2. When reviewing Government Exhibit 105, the Samsung Galaxy S9+, Santos located an IMEI number which is physically engraved on the case back of the phone.

3. The IMEI number that Santos observed in the data set forth in Government Exhibit 500B is from a Samsung Galaxy S9+ phone, and that IMEI number matches the IMEI number engraved on Government Exhibit 105.

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In reviewing Government Exhibit 500B, Santos found evidence demonstrating that the cell phone's owner and user is Landji. This evidence includes emails in which the user identifies himself or is identified by others as Landji. The phone also contains selfies that show Landji and his passport.

This phone also contains conversations with Adamu and alleged coconspirator Fofana and photos and videos that show a desert airstrip and Fofana's passport. *Id.* at page 5.

As to Government Exhibit 106, the phone seized from Adamu, the government proffers that:

1. When reviewing Government Exhibit 500C, Santos located an IMEI number in an area of the forensic image containing other unique identifiers of the source phone.

When reviewing Government Exhibit 106, the Samsung Galaxy J7, Santos located an IMEI number which is physically engraved underneath the battery inside the phone.

3. The IMEI number that Santos observed and the data set forth in Government Exhibit 500C is from a Samsung Galaxy [307]J7 phone, and that IMEI number matches the IMEI number engraved on Government Exhibit 106.

In reviewing Government Exhibit 500C, Santos found evidence demonstrating that the cell phone's owner and

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user is Adamu. This evidence includes a reference in the phone indicating that the owner is Jibril Adamu. The calendar in the phone is linked to the following email address: jjibril@gmail.com. The phone contains selfies that show Adamu. The phone also includes communication between the user and Landji and Fofana, as well as photos of Adamu, Landji, and Curtiss Seal with the airplane that was flown into Zagreb on October 30, 2018. *Id.* at pages 5-6.

Under Federal Rule of Evidence 901, this Court must find that the government has provided a basis from which the jury could find that the extractions that the government offers are what they purport to be, that is, extractions from the defendants' phones. The legal standard for demonstrating authenticity is summarized as follows in *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007).

"The bar for authentication of evidence is not particularly high." *United States v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001). "The requirement of authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Federal Rule of Evidence 901(a). "Generally, a document is properly [308]authenticated if a reasonable juror could find in favor of authenticity." *United States v. Tin Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004). "The proponent need not rule out all possibilities inconsistent with authenticity or to prove beyond any doubt that the evidence is what it purports to be." Citing *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999).

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In seeking to preclude Santos' testimony, defendants argue that "the process of extracting cell phone data using the Cellebrite software is far more extensive and requires substantially more sophistication and skill than, say, simply plugging a hard drive into a computer and downloading its contents." Citing the October 13, 2021, defense letter, Dkt. No. 586, at page 3. But the fact that training regarding the extraction and analysis of data from cell phones is necessary to employ the Cellebrite software is not an argument for precluding Mr. Santos' testimony, because the government represents that he has received such training, that he's analyzed more than 2,000 cell phones himself, and that he's reviewed extractions performed by others on at least 50 occasions. Citing the October 13, 2021, government letter, Dkt. No. 585, at page 3.

Defendants further argue that because Mr. Santos did not perform the extractions himself, he cannot testify that the "extractions are complete, unaltered, and accurate copies of the data actually contained on the defendants' phones." Citing [309]the October 13, 2021, defense letter, Dkt. No. 586, at pages 3-4. But the government has represented that Santos will testify that the Cellebrite software "creates an exact copy of data from a cell phone" that cannot "be altered or edited." Citing the October 13, 2021, government letter, Dkt. No. 585, at page 4.

Defendants claim that the government has conceded that the Cellebrite software does not create a "mirror image" and that, therefore, the images created by that software may not be complete and accurate. Citing the

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October 13, 2021, defense letter, Dkt. No. 586, at page 4, note 3. But the government's "mirror image" remark is taken out of context. In stating that the Cellebrite software does not take a mirror image, the government was making the point that it will not represent to the jury that the images it presents reflects everything that is on the defendants' phones. Citing the October 13, 2021, government letter, Dkt. No. 585, at page 10. Instead, the government will argue, based on the evidence I cited earlier, including the IMEI numbers and the contents of the extractions themselves, that the extractions reflect the contents of the defendants' phones. *Id.*

The Second Circuit has stated that the standard for authentication is one of "reasonable likelihood." Citing *Gagliardi*, 506 F. 3d at 151 and is "minimal." Citing *Tin Yat Chin*, 373 F.3d at 78. Moreover, evidence of authenticity "may [310]be direct or circumstantial, and the latter category may include distinctive characteristics of the document itself." Citing *United States v. Maldonado Rivera*, 922 F.2d 934, 957 (2d Cir. 1990). Finally, Rule 901 teaches that authenticity may be demonstrated by testimony addressing the "appearance, content, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Citing Federal Rule of Evidence 901(a) (4).

I conclude that if Mr. Santos testifies consistently with the government's proffer, the Rule 901 standard for proving authenticity will be met. While Mr. Santos did not perform the extractions from the defendants' cell phones himself, as a result of his expertise in the

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forensic examination of cell phones, he can testify that (1) Government Exhibit 500A, 500B, and 500C are reports concerning the extraction of data from cell phones; (2) the extraction reports are forensic images that were created through the use of Cellebrite, a software tool with which he's familiar; (3) Cellebrite creates an exact copy of data from cell phones, and the image this program contains are not subject to editing or alteration; (4) each cell phone has an IMEI number which is unique; (5) each of the three cell phones at issue has an IMEI number that Santos has identified; (6) the forensic image created by the Cellebrite software reveals the IMEI number for [311]the source cell phone; and (7) by comparing the IMEI numbers, Santos has matched each of the forensic reports with one of the three cell phones.

In reviewing the forensic report, Santos also observed data indicating that Government Exhibit 104 and Government Exhibit 105 are Landji's phones. This data includes, among other things, email accounts with which Landji is associated, as well as selfies and other material linking the phone and the corresponding forensic reports to Landji. *See* Government Exhibit 500A, Government Exhibit 500B.

The same is true with respect to Adamu and Government Exhibit 106. The corresponding forensic report, Government Exhibit 500C, includes a calendar that is linked to Adamu's Gmail account. The report also indicates that the phone contains selfies of Adamu and communications between the user of the phone and Landji and alleged coconspirator Youssef Fofana.

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The government has cited *United States v. Gayle*, 16 Cr. 361(CS) in support of its application to admit the extraction reports. *See* Dkt. No. 585-1 (excerpt from trial transcript in *United States v. Gayle*). The evidence here is on all fours with the evidence that Judge Seibel considered in admitting extraction reports in that case in which the person who had performed the extraction was not going to testify at trial, and the government proposed that Mr. Santos testify in [312]his stead. I find Judge Seibel's reasoning applicable here, and I find the defendants' efforts to distinguish *Gayle*, (*see* October 13, 2021, defense letter, Dkt. No. 586, at page 4), not persuasive.

Defendants argue, however, that the government's letter does not address their arguments that the Confrontation Clause forbids the admission of the extraction reports. *Id.* at page 4. However, the defendants' Confrontation Clause argument in their October 11, 2021, letter consisted of merely asserting that there might be "potential Confrontation Clause issues" with a citation to *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). *See* October 11, 2021, defense letter, Dkt. No. 583, page 2.

In defendants' reply to the government's October 13, 2021, letter, they flesh out their Confrontation Clause argument, citing cases in which courts determined that certain expert certifications and affidavits are testimonial, and thus fall within the ambit of the Confrontation Clause. *See* October 13, 2021, defense letter, Dkt. No. 58, at page 4. Defendants' rely, in particular, on *United States v. Hajbeh*, 2021 WL 4552141 (E.D. Va., Oct. 5, 2021), and *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 2009. These cases are not on point.

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Hajbeh is a child pornography case in which the government sought to “authenticate images and videos extracted [313]from the [defendant’s] iPhones through the affidavits of [FBI] Agents Kochy and Cooney under Rule 902 (13).” Citing *Hajbeh*, 2021 WL 4552141, at *1. Federal Rule of Evidence 902 addresses evidence that is self-authenticating and Rule 902(13) concerns one category of self-authenticating evidence: “Certified records generated by an electronic process or system.” Here, the government has not argued that the extraction reports are self-authenticating, and the government is not relying in any fashion on Rule 902.

In any event, in *Hajbeh*, the defendant argued that the government had not satisfied the requirements of Rule 902(13), and that admission of the agent’s affidavits would violate the Confrontation Clause because their affidavits constituted testimonial hearsay under *Crawford v. Washington*, 541 U.S. 36, 2004. *Id.*

The government responded that certain courts had held that certificates of authenticity, similar to the agent’s affidavits, could be admitted “in the absence of testimony from the certificate’s author without violating the Confrontation Clause.” *Id.* The *Hajbeh* court rejected the government’s argument, finding that the agent’s affidavits were clearly testimonial and “directly implicate the concerns underlying the Confrontation Clause.” *Id.* at *2. The Court went on to hold that the government could not prove the contents of the defendant’s phone through the introduction of the agent’s [314]affidavits, and that the government would instead be required to call the agents as witnesses. *Id.*

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Similarly, in *Melendez-Diaz*, the Supreme Court found a Confrontation Clause violation where prosecutors presented to a jury “affidavits reporting the results of forensic analysis [by nonwitness analysts] which showed that material seized by the police and connected to the defendant was cocaine.” Citing *Melendez-Diaz*, 557 U.S. at 307.

This case does not involve the use of any affidavits or certifications. Instead, the government proposes to offer live testimony from a witness with extensive expertise in the forensic analysis of cell phones, someone who’s intimately familiar with the Cellebrite software, who will testify that certain data presented to him on a hard drive was extracted from defendants’ cell phones. I have discussed in some detail Mr. Santos’ reasons for reaching that conclusion, which I find compelling. I suspect that he will testify in much greater detail as to the basis for his conclusions, but the point is that he will be available for cross-examination as to the basis for his findings.

I conclude that the expected testimony from Santos is sufficient under Rule 901 to demonstrate that the extraction reports reflect data obtained from the defendants’ cell phones. I further conclude that defendants have not demonstrated that admission of Mr. Santos’ testimony would violate the [315]Confrontation Clause.

All right. Are there other matters the lawyers wish to raise?

MR. HELLMAN: No. Thank you, your Honor.

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MR. BIALE: So, your Honor, one issue, just to continue the record on the proposed move of the defendants from the MCC to the MDC and the issue with their legal papers. So I was advised by Mr. Landji this morning that while they were supposed to be moved either last night or this morning, because of a security issue at the MDC, the MDC is on lockdown, and therefore, they were not moved. Mr. Landji says he has one envelope of legal papers, but that the bulk of his possessions, including discovery materials in this case, have not been returned to him. My understanding is that those were -- those items were taken from him the night before last -- sorry, your Honor. Let me just make sure that's accurate.

(Counsel conferred with defendant)

MR. BIALE: I'm sorry, your Honor. Just confirming that.

So that is correct. His materials were taken Tuesday night. We had hoped that they'd be returned to him last night, Wednesday night. It's now Thursday morning, and they haven't been returned to him. I raised the issue with the prosecutors. They said that they will get in touch once again with Nicole McFarland, who is BOP counsel, and urge her to return the

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**APPENDIX E — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK, FILED APRIL 29, 2021**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(S1) 18 Cr. 601 (PGG)

UNITED STATES OF AMERICA

-against-

JIBRIL ADAMU, AND
JEAN-CLAUDE OKONGO LANDJI,

Defendants.

April 28, 2021, Decided
April 29, 2021, Filed

Paul G. Gardephe, United States District Judge.

ORDER

PAUL G. GARDEPHE, U.S.D.J.:

Defendants Jibril Adamu and Jean-Claude Okongo Landji (“Defendants”) are charged in (S1) Indictment 18 Cr. 601 (PGG) with conspiring to distribute and possess with intent to distribute five kilograms and more of cocaine on board a U.S.-registered and U.S.-owned aircraft. ((S1) Indictment (Dkt. No. 39)) Landji and Adamu are also

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charged with distributing and possessing with intent to distribute five kilograms and more of cocaine while on board a U.S.-registered and U.S.-owned aircraft. (*Id.*)

In their pre-trial motions, Defendants seek a severance from their co-defendants in the (S1) Indictment, and Landji seeks a severance from Adamu. (Adamu Br. (Dkt. No. 354) at 4-5; Landji Br. (Dkt. No. 352) at 3-9)¹ Defendants also complain that the Government has improperly retained documents - originally seized by Croatian authorities - that contain privileged communications. They seek the return of these documents. (Adamu Br. (Dkt. No. 354) at 3-4; Landji Br. (Dkt. No. 352) at 9) Finally, Adamu contends that the charges against him should be dismissed for lack of jurisdiction. (Adamu Br. (Dkt. No. 354) at 5-8)

For the reasons stated below, Defendants' motions will be denied.

BACKGROUND**I. FACTUAL ALLEGATIONS**

The Government charges that, between April and July 2018, Landji and Adamu's co-defendant, David Cardona-Cardona, engaged in a conspiracy to transport more than 1,200 kilograms of cocaine from South America

1. The page numbers referenced in this Order correspond to the page numbers designated by this District's Electronic Case Files ("ECF") system.

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to Holland.² (Cardona-Cardona Cmplt. (Dkt. No. 1) at ¶¶ 23-32) Cardona-Cardona and his co-conspirators planned that if this initial shipment to Holland was successful, the same vessel would be used to transport large quantities of cocaine to West Africa. (Govt. Opp. (Dkt. No. 364) at 5) From there, the cocaine would be flown to buyers in Croatia. According to the Government, Landji and Adamu - who are both pilots - agreed to transport Cardona-Cardona's cocaine from West Africa to Croatia and other parts of southern Europe for sale there. (*Id.* at 5-7; Cardona-Cardona Cmplt. (Dkt. No. 1) ¶ 17)³

Landji is a United States citizen who owned and operated an aviation charter business called Okland Aviation, a limited liability company based in Georgia. Okland Aviation owned a U.S.-registered Gulfstream IIB airplane. Okland Aviation employed Adamu as a pilot. (Cardona-Cardona Cmplt. (Dkt. No. 1) ¶¶ 17-18; Govt. Opp. (Dkt. No. 364) at 6)

In May 2018, Landji met with Cardona-Cardona and DEA informants in Lome, Togo - in West Africa - to discuss using Landji's airplane to transport cocaine from West Africa to southern Europe. (Cardona-Cardona Cmplt.

2. In Count Seven of the (S1) Indictment, this cocaine shipment is the basis for a Maritime Drug Law Enforcement Act charge against Cardona-Cardona. ((S1) Indictment (Dkt. No. 39)) Landji and Adamu are not charged in Count Seven.

3. The Cardona-Cardona Complaint references a co-conspirator labeled "CC-1." The Government disclosed that "CC-1" references Landji. (*See* March 6, 2020 Govt. Ltr. (Dkt. No. 254) at 1)

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(Dkt. No. 1) ¶ 17) In recorded conversations, Cardona-Cardona and Landji discussed with the DEA informants prior cocaine shipments, Landji's access to airplanes, and future plans to transport large quantities of cocaine to Croatia. These discussions included references to the fact that Landji owned the Gulfstream IIB airplane (the "G2"), that the plane was registered in the United States, and that Landji and Adamu would fly the G2 to Croatia with an initial shipment as a test run for future shipments of hundreds of kilograms of cocaine. Landji also described his experience with "black flights," in which "flight plans are either misfiled or not filed at all, and communications and safety equipment are deactivated" in order to evade law enforcement. (Govt. Opp. (Dkt. No. 364) at 6-7)

During the May 2018 discussions in Togo, Cardona-Cardona told a DEA informant that "we" changed the registration of Landji's U.S. registered plane, "because once you put a kilo inside a plane that has an American registration [it] is as if you were putting it in the center of New York. . . . [a]t a legal level. At a criminal level." (*Id.* at 7) Cardona-Cardona and Landji engaged in a similar conversation about the legal ramifications of using a U.S. registered plane to transport cocaine. (*Id.*) Landji confirmed that he understood that the plane that would be used to transport cocaine to Croatia "should not have an American registration." He also confirmed that his plane could carry as much as one ton of cocaine. (*Id.* at 7-8)

After the May 2018 discussions in Togo, Cardona-Cardona had additional meetings with DEA informants to further discuss his plan to transport cocaine to southern

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Europe by aircraft. Cardona-Cardona planned to trade the cocaine for sophisticated weaponry, which he would then sell to extremist groups in Africa. (*Id.* at 8; Cardona-Cardona Cmplt. (Dkt. No. 1) ¶ 19)

On September 15, 2018, Cardona-Cardona met with the DEA informants and an undercover Croatian law enforcement officer in Zagreb, Croatia. The informants and undercover officers brought Cardona-Cardona to a warehouse where they showed him a box of AK-47 machineguns, a surface-to-air missile, and night-vision goggles. Cardona-Cardona told the informants and undercover officers that this equipment was highly useful and sought after in Africa, and that they would be sold to Ansar al-Dine, a terrorist organization. He also said that he planned to use the weapons to protect the shipments of cocaine that would be transported to Africa. (Govt. Opp. (Dkt. No. 364) at 8; Cardona-Cardona Cmplt. (Dkt. No. 1) ¶ 20)

During this same Zagreb meeting, Cardona-Cardona told the informants that the airplane he would use to transport the cocaine and weapons would have an altered tail number. The U.S. registered tail number would be changed to an African tail number in order to evade U.S. jurisdiction. (Cardona-Cardona Cmplt. (Dkt. No. 1) ¶ 20(f))

Cardona-Cardona also stated that a shipment of 500 kilograms of cocaine had recently arrived in Guinea Bissau, and that he would use this cocaine for the weapons transaction. (*Id.* ¶ 20(g))

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On September 16, 2018, Cardona-Cardona met again with the DEA informants in Zagreb. One of the informants told Cardona-Cardona that he had access to a portion of Zagreb International Airport that was used by private aviation. The informant arranged for Cardona-Cardona and an undercover Croatian law enforcement officer posing as a corrupt security guard to tour the private aviation area. Cardona-Cardona said that he was pleased with the arrangements, and that Landji's plane was ready to be used for transporting the cocaine, and would be operated by "trained pilots." (*Id.* ¶ 21)

Cardona-Cardona told a DEA informant that – using cocaine – he wished to purchase two surface-to-air missiles, a box of rifles, one or two boxes of ammunition, a fifty-caliber rifle, and night vision goggles. Cardona-Cardona said that he planned for the airplane to bring at least two to three kilograms of cocaine to Zagreb, and that the shipment could be as large as twenty kilograms. It was agreed that the exchange of cocaine for the weapons and other equipment would take place in the private aviation area of the Zagreb airport. (*Id.*)

On October 9, 2018, Cardona-Cardona sent an encrypted message to a DEA informant stating that the cost of the flight to Zagreb would be €90,000, and that the plane would arrive in Zagreb eight days after the payment was made. (*Id.* ¶ 22)

On October 18, 2018, Cardona-Cardona traveled to Croatia, where he had several additional meetings with the DEA informants in order to finalize plans for

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the arrival of the G2 with the cocaine and to repeat his demands for flight expenses. (Govt. Opp. (Dkt. No. 364) at 8) Cardona-Cardona told the DEA informants that he would provide a sample of cocaine for their approval. Once they approved the initial sample, Cardona-Cardona said that 500 kilograms of cocaine then in Africa would be flown to Croatia. (*Id.*)

Landji and Adamu then made final preparations for the flight to Croatia with the cocaine “sample.” Landji filed passport information for the Defendants and flight plans for the G2. The flights plans indicated that the G2 would fly from Africa to Zagreb, Croatia. Landji and Adamu agreed that the cocaine “sample” would be one kilogram. Cardona-Cardona discussed with Adamu the location of the cocaine “sample,” and its delivery to Adamu and Landji in Africa prior to the flight to Croatia. Adamu confirmed with Cardona-Cardona that he and Landji were prepared for the flight to Croatia, and were merely waiting for delivery of the cocaine sample. (*Id.* at 9)

On October 30, 2018 - after Landji and Adamu had received the one-kilogram “sample” - they flew Landji’s plane to Zagreb. Landji and Adamu were arrested by Croatian authorities once they landed in Zagreb, and one kilogram of cocaine was seized from the G2. (*Id.*)

Shortly after his arrest, Adamu met with representatives of the DEA and Croatian law enforcement. He received *Miranda* warnings, and agreed in writing to waive his rights. Adamu admitted knowing that Cardona-Cardona was a drug dealer who used airplanes to smuggle

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narcotics. He admitted to having assisted Cardona-Cardona in the past in finding airplanes to transport narcotics, and described one incident in which Cardona-Cardona had paid him \$3,000 to transport cocaine from Guinea Bissau to Panama. (*Id.* at 9-10; Tremonte Decl., Ex. A (Dkt. No. 355-1))

As to Landji, Adamu said that he had recently joined Landji's aviation company as a pilot. Adamu told the agents that Landji (1) knew Cardona-Cardona; (2) had told Adamu that Cardona-Cardona was planning on travelling from West Africa to Europe; and (3) that Landji intended to meet with Cardona-Cardona in Zagreb. Adamu said that Cardona-Cardona and Landji were meeting in Zagreb to discuss Cardona-Cardona's narcotics trafficking. (*Id.*; Tremonte Decl., Ex. A (Dkt. No. 355-1))

II. CHARGES AND EXTRADITION FROM CROATIA

In November 2018, Cardona-Cardona, Landji, and Adamu were charged with conspiring to distribute and possess with intent to distribute five kilograms and more of cocaine on board a U.S.-registered and U.S.-owned aircraft, in violation of 21 U.S.C. §§ 959(c), 959(d), 963 and 18 U.S.C. § 3238. Cardona-Cardona, Landji, and Adamu were also charged with distributing and possessing with intent to distribute five kilograms and more of cocaine on board a U.S.-registered and U.S.-owned aircraft, in violation of 21 U.S.C. §§ 812, 959(c), 959(d), 960(a)(3), 960(b)(1)(B) and 18 U.S.C. §§ 3238 and 2. ((S1) Indictment (Dkt. No. 39) ¶¶ 1-6)

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The United States sought Landji and Adamu's extradition from Croatia. The extradition process consumed nearly a year. (Govt. Opp. (Dkt. No. 364) at 11) Once the extradition process was completed, DEA agents took custody of the Defendants and personal effects and documents that had been seized by Croatian authorities. The Government produced the documents to the Defendants during discovery. (Fihlman Decl. (Dkt. No. 398-1) ¶¶ 4-5)

Trial is scheduled for June 8, 2021. (Dkt. No. 428) As discussed above, in their pretrial motions, Defendants seek a severance from their co-defendants in the (S1) Indictment, and Landji seeks a severance from Adamu, alleging that Adamu's post-arrest statements create a *Bruton* issue. (Adamu Br. (Dkt. No. 354) at 4-5; Landji Br. (Dkt. No. 352) at 3-9) Defendants also seek the return of documents that the Government obtained from Croatian authorities, claiming that these documents contain information protected by the attorney-client and work product privileges. (Adamu Br. (Dkt. No. 354) at 3-4; Landji Br. (Dkt. No. 352) at 9) Finally, Adamu contends that the charges against him must be dismissed for lack of jurisdiction. (Adamu Br. (Dkt. No. 354) at 5-8)

DISCUSSION**I. SEVERANCE**

Landji and Adamu seek a severance from the other Defendants charged in the (S1) Indictment: Steven Antonius, David Cardona-Cardona, Shervington Lovell

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and Argemiro Zapata-Castro. (Landji Br. (Dkt. No. 352) at 6-9; Adamu Br. (Dkt. No. 354) at 4-5) Landji and Adamu's motions will be denied as moot, because Antonius, Cardona-Cardona, Lovell, and Zapata-Castro have all pled guilty. (Antonius Plea Tr. (Dkt. No. 388); Cardona-Cardona Minute Entry Apr. 26, 2021; Lovell Minute Entry Nov. 23, 2020; Zapata-Castro Plea Tr. (Dkt. No. 294))

Landji further contends that he should be granted a severance as to Adamu, because of *Bruton* issues. (Landji Br. (Dkt. No. 352) at 3-5)

A. Applicable Law

Federal Rule of Criminal Procedure 8(b) provides that two or more defendants may be joined in a single indictment “if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses.” Fed. R. Crim. P. 8(b). Joinder of defendants in multiple-count indictments is proper where the charged conduct is “unified by some substantial identity of facts or participants’ or ‘arise[s] out of a common plan or scheme.” *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989) (quoting *United States v. Porter*, 821 F.2d 968, 972 (4th Cir. 1987)) (citing *United States v. Green*, 561 F.2d 423, 426 (2d Cir. 1977)); accord *United States v. Rittweger*, 524 F.3d 171, 177 (2d Cir. 2008).

Joinder is also appropriate where “common factual elements” of different charges are readily apparent. *United States v. Turoff*, 853 F.2d 1037, 1044 (2d Cir.

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1988). “For example, counts might be ‘connected’ if one of the offenses ‘depend[s] upon []or necessarily l[eads] to the commission of the other,’ or if proof of one act ‘constitute[s] []or depend[s] upon proof of the other.” *United States v. Shellef*, 507 F.3d 82, 98 (2d Cir. 2007) (quoting *United States v. Halper*, 590 F.2d 422, 429 (2d Cir. 1978)) (alterations in *Shellef*). Similarly, where one offense stems from the other, “that link provides a sound basis for joinder under Rule 8(b).” *Turoff*, 853 F.2d at 1044.

Landji and Adamu are alleged to have conspired to distribute and possess with intent to distribute five kilograms and more of cocaine on board a U.S.-registered and U.S.-owned aircraft. ((S1) Indictment (Dkt. No. 39) ¶¶ 1-4) The charges against the Defendants arise from jointly-undertaken conduct and arise from a common scheme or plan. Accordingly, joinder is clearly appropriate. *See United States v. Cooper*, No. 17-CR-296 (PKC), 2020 U.S. Dist. LEXIS 81672, 2020 WL 2307646, at *5 (E.D.N.Y. May 8, 2020) (“[A] non-frivolous conspiracy charge’ is generally sufficient to support joinder.” (quoting *United States v. Nerlinger*, 862 F.2d 967, 973 (2d Cir. 1988))); accord *United States v. Davis*, No. 17 CR. 610 (LGS), 2018 U.S. Dist. LEXIS 156379, 2018 WL 4373998, at *4 (S.D.N.Y. Sept. 13, 2018).

Federal Rule of Criminal Procedure 14 provides, however, that even where - as here - joinder is proper under Rule 8(b), a court may nonetheless grant a severance “[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant or the government” Fed. R. Crim. P. 14.

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In order to prevail on a severance motion under Rule 14, a “defendant must show not simply some prejudice but *substantial* prejudice.” *United States v. Sampson*, 385 F.3d 183, 190 (2d Cir. 2004) (quoting *United States v. Werner*, 620 F.2d 922, 928 (2d Cir. 1980)) (emphasis in *Sampson*). A defendant has the “extremely difficult burden” of showing that he would be so prejudiced by joinder that he would be denied a fair trial. *United States v. Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989) (internal quotation marks and citation omitted). It is thus not sufficient for a defendant to show that he “may have a better chance of acquittal in [a] separate trial[].” *Zafiro v. United States*, 506 U.S. 534, 540, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Instead, “a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of [a defendant], or prevent the jury from making a reliable judgment about guilt or innocence.” *Id.* at 539. Even in those rare instances where a defendant establishes a “high” risk of prejudice, “less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.” *Id.* (citing *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987)).

The Second Circuit has instructed that “the principles that guide the district court’s consideration of a motion for severance usually counsel denial.” *United States v. Rosa*, 11 F.3d 315, 341 (2d Cir. 1993).

A severance may be necessary, however, where statements made by a co-defendant threaten to violate a defendant’s Sixth Amendment rights under the

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Confrontation Clause. Where the Government seeks to offer a statement from a co-defendant who will not testify at trial, and that statement specifically inculcates a co-defendant, courts “cannot accept limiting instructions as an adequate substitute for [the co-defendant’s] constitutional right of cross-examination.” *Bruton v. United States*, 391 U.S. 123, 135-37, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). In such circumstances, courts generally have three options: (1) careful redaction of the out-of-court statement such that all references to the co-defendant are eliminated; (2) severance; or (3) exclusion of the statement at the joint trial. *United States v. Jass*, 569 F.3d 47, 56 n.5 (2d Cir. 2009)

The Second Circuit has approved two types of redaction to address *Bruton* concerns: (1) a redaction that eliminates all reference to a co-defendant’s existence; and (2) a redaction that replaces a co-defendant’s name with a neutral pronoun such that the statement, standing alone, cannot be understood to refer to the co-defendant. *Id.*, 569 F.3d at 56 (*Bruton* concerns may be addressed through use of a limiting instruction and redaction that “eliminate[s] not only the defendant’s name, but any reference to his or her existence” (quoting *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987))); *see also id.* (“[A] redacted statement in which the names of co-defendants are replaced by neutral pronouns, with no indication to the jury that the original statement contained actual names, and where the statement standing alone does not otherwise connect co-defendants to the crimes, may be admitted without violating a co-defendant’s *Bruton* rights.” (quoting *United States v. Tutino*, 883 F.2d 1125, 1135 (2d Cir. 1989))).

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The Second Circuit has made clear that the first method of redaction - which “eliminate[s] completely from a confession any mention of a non-declarant defendant’s existence” - is the preferred approach. *Id.* at 56 n.5. The second method of redaction, which employs neutral pronouns, should be employed “only” as a last resort, “when complete redaction would distort the confession . . . or chang[e] the tenor of the utterance as a whole.” *Id.* (internal citation and quotation marks omitted). Moreover, the Supreme Court has cautioned that clumsy redactions that “simply replace a name with an obvious blank space or word such as ‘deleted’ or . . . other similarly obvious indications of alteration” do not suffice to eliminate *Bruton* concerns. Indeed, such redactions “so closely resemble *Bruton*’s unredacted statements . . . that . . . the law . . . require[s] the same result.” *Gray v. Maryland*, 523 U.S. 185, 192, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998).

Where neutral pronouns are used, the propriety of the redactions should be considered in light of two inquiries: “(1) did the redacted statement give any ‘indication to the jury that the original statement contained actual names,’ and (2) did ‘the statement standing alone . . . otherwise connect co-defendants to the crimes.’” *Jass*, 569 F.3d at 58 (quoting *Tutino*, 883 F.2d at 1135). A court considering the admissibility of a redacted statement that employs neutral pronouns must “view the redacted confession in isolation from the other evidence” in order to insure that “the confession, when so viewed, does not incriminate the defendant.” *United States v. Williams*, 936 F.2d 698, 700-01 (2d Cir.1991). “The critical inquiry is always whether introduction of a confession at a joint trial presents an ‘overwhelming probability’ that the jury will

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not be able to follow an instruction limiting consideration of the confession to the declarant defendant.” *Jass*, 569 F.3d at 56 n.5 (quoting *Richardson*, 481 U.S. at 208); *see also id.* at 60-61. Where a redacted statement utilizing neutral pronouns passes this test, “it may be admitted with a proper limiting instruction even though other evidence in the case indicates that the neutral pronoun is in fact a reference to defendant.” *Williams*, 936 F.2d at 700-01; *see also Jass*, 569 F.3d at 61 (“The critical inquiry is, thus, not whether a jury might infer from other facts (whether evidence admitted at trial or circumstances such as the number of defendants on trial) that a declarant’s neutral allusion to a confederate might have referenced the defendant.”).

B. Application

Landji contends that he is entitled to a severance from Adamu because Adamu made statements in a post-arrest interview that “directly implicat[e] Mr. Landji in the crime alleged in the indictment,” such that the admission of Adamu’s statements at a joint trial would violate Landji’s Sixth Amendment rights under the Confrontation Clause. (Landji Br. (Dkt. No. 352) at 3)

In connection with his severance motion, Landji has submitted a DEA “Report of Investigation” that describes an interview of Adamu conducted by DEA agents on October 31, 2018, after Adamu was arrested in Zagreb. At the outset of this interview, Adamu received *Miranda* warnings and waived his rights. (Tremonte Decl., Ex. A (Dkt. No. 355-1) at 2-3)

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Most of the DEA report recounts Adamu's statements about his communications with Cardona-Cardona. (*Id.* at 3-4) The DEA report also states, however, that Adamu told agents that Landji had flown with Adamu on the aircraft to Zagreb. (*Id.* at 3) Adamu also told agents that Landji knew Cardona-Cardona, that Landji told Adamu that Cardona-Cardona would be traveling from West Africa to Europe, and that Landji would be meeting with Cardona-Cardona in Zagreb. Adamu further stated that he "assumed" that Landji would be discussing drug trafficking with Cardona-Cardona, because Cardona-Cardona is a drug dealer:

ADAMU said LANDJI knows CARDONA and it was LANDJI who informed ADAMU that CARDONA was planning to travel from [W]est Africa to Europe. . . . Per ADAMU, he knew LANDJI would be meeting CARDONA and other business associates when they arrived in Zagreb. ADAMU indicated he assumed that CARDONA, LANDJI and the other associates [were] coming to Zagreb to discuss drug business because that is what CARDONA does. ADAMU claimed that he was not going to attend those meetings.

(*Id.* at 4)

The Government intends to "offer evidence of Adamu's post-arrest statements through the testimony of one or more witnesses." (Govt. Opp. (Dkt. No. 364) at 16) However, the Government maintains that any *Bruton* issue can be addressed by redacting Landji's name. (*Id.* at 16-18) The Government has not made a specific proposal

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as to how Adamu's post-arrest statements should be redacted, however.

The Court concludes that Adamu's post-arrest statements can be redacted to ensure that Landji's Sixth Amendment rights are not violated. While Landji contends that any redaction of his name would be ineffective - because "there is only one person to whom Adamu could be referring with his incriminating statements" (Landji Reply Br. (Dkt. No. 380) at 3) - Adamu's statements refer to multiple people, including Cardona-Cardona and "other business associates." (Tremonte Decl., Ex. A (Dkt. No. 355-1) at 3-4) Accordingly, it is not clear that the use of neutral pronouns, as to certain statements, presents any risk of inculcating Landji in violation of the Sixth Amendment. *See, e.g., United States v. Ashburn*, 76 F. Supp. 3d 401, 427 (E.D.N.Y. 2014); *United States v. Lyle*, 919 F.3d 716, 735 (2d Cir. 2019) (finding no *Bruton* error when "statements referred to multiple people - not only one unnamed person to correspond to the one co-defendant" - and thus "did not present the necessary process-of-elimination problem that left the jury's choice of implied identity narrow" (emphasis, internal quotation marks and citation omitted)). Use of neutral pronouns may not be appropriate as to other statements, and certain statements - such as Adamu's assumptions about why Cardona and Landji were meeting in Zagreb - are independently inadmissible.

What portions of Adamu's post-arrest statements the Government will seek to introduce, and the precise redaction that will be required, must await trial. Severance is not required, however, because the Court

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will redact Adamu's post-arrest statements in order to protect Landji's Sixth Amendment rights.

Accordingly, Landji's motion for a severance as to Adamu will be denied.

II. RETURN OF DOCUMENTS

Defendants were arrested in Croatia in October 2018 and were held in a Croatian jail while awaiting extradition to the United States. While in Croatia, each Defendant was represented by counsel. After extradition was granted, DEA agents took custody of the Defendants, and of personal effects and documents related to their case. (Fihlman Decl. (Dkt. No. 398-1) ¶¶ 3-4) The DEA agents identified "several hundred pages of documents" as potentially related to Defendants' Croatian court proceedings, and - at Defendants' request - the agents separated these documents from other paperwork. (*Id.* ¶ 5; Waters Decl. (Dkt. No. 398-2) ¶¶ 3-4) The agents did not review these documents, which are in Croatian, a language that the agents do not understand and cannot read. (*Id.* at ¶¶5, 7; Waters Decl. (Dkt. No. 398-2) ¶¶ 4-5)

On January 21, 2020, as part of Rule 16 discovery, the Government produced to Landji and Adamu copies of the alleged privileged material. (Hellman Decl. (Dkt. No. 398) ¶ 5) The Government has submitted declarations representing that no Government personnel have reviewed the contents of these allegedly privileged documents.⁴ (*Id.*

4. In light of the declarations from the Government and DEA personnel, the Defendants' request for a hearing "to determine

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¶¶ 6-7) Although the Defendants have received copies of these documents, they seek the return of the originals. (Adamu Br. (Dkt. No. 354) at 3; Landji Br. (Dkt. No. 352) at 9) The Government has denied this request, stating that Defendants have not made an adequate showing that these documents are in fact protected by the attorney-client and/or work product privileges. (Govt. Opp. (Dkt. No. 364) at 19-21)

“The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice.” *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011). The purpose of the privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). “In order to balance this protection of confidentiality with the competing value of public disclosure, however, courts apply the privilege only where necessary to achieve its purpose and construe the privilege narrowly because it renders relevant information undiscoverable.” *Mejia*, 655 F.3d at 132 (quotation marks, alterations, and citation omitted). Defendants bear the burden of establishing the privilege. *Id.*

whether or not the [G]overnment’s review of these materials violated [Defendant’s] Fifth and Sixth Amendment Rights” is denied. (Landji Br. (Dkt. No. 352) at 9; *see* Adamu Br. (Dkt. No. 354) at 3)

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Here - although Defendants have copies of the documents at issue - they have not demonstrated that the documents at issue contain communications between Landji and Adamu and their attorneys that were intended to be kept confidential and were used for obtaining or providing legal advice. (Landji Br. (Dkt. No. 352) at 9; Adamu Br. (Dkt. No. 354) at 3-4) Defendants merely state that “[i]t seems beyond dispute that the ‘packets’ taken from the defendants included their written communications to and from Croatian counsel.” (Landji Reply Br. (Dkt. No. 380) at 5) This assertion does not provide a basis for this Court to find that the documents at issue are protected by the attorney-client or work product privilege. *See Bloomingburg Jewish Educ. Ctr. v. Vill. of Bloomingburg*, 171 F. Supp. 3d 136, 142 (S.D.N.Y. 2016) (denying a request to quash a subpoena where counsel’s assertion of attorney-client and work-product privileges “failed to engage the basic work necessary to satisfy their burden of showing that any particular documents or communications are protected from disclosure under either privilege”). Accordingly, Defendants’ request for the return of these materials will be denied.

III. JURISDICTION

Adamu has moved to dismiss the charges against him for lack of jurisdiction. (Adamu Br. (Dkt. No. 354) at 5-8) He argues that these charges violate his Fifth Amendment due process rights because he is not a U.S. citizen and is not charged with any conduct that took place in the United States. (*Id.* at 6) Adamu further contends that the alleged involvement of a U.S.-registered and U.S.-owned aircraft

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is insufficient, because “[t]here is no proof that the aircraft intended to enter into the United States.” (*Id.*)

Although Adamu’s conduct occurred outside the United States, it is within the reach of 21 U.S.C. § 959. (*See* (S1) Indictment (Dkt. No. 39) ¶¶ 1-6) Section 959(c) makes it “unlawful for . . . any person on board an aircraft owned by a United States citizen or registered in the United States[] to . . . distribute . . . or . . . possess a controlled substance or listed chemical with intent to distribute.” The statute expressly provides for extraterritorial application. 21 U.S.C. § 959(d) (“This section is intended to reach acts of . . . distribution committed outside the territorial jurisdiction of the United States.”). And the Second Circuit has confirmed that Congress intended that the statute be applied to conduct that takes place entirely outside of the United States. *United States v. Epskamp*, 832 F.3d 154, 166 (2d Cir. 2016).

As to Adamu’s due process argument, a “sufficient nexus” must exist to ensure that the extraterritorial application of a federal criminal law, such as Section 959, comports with constitutional due process. *See United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003). The purpose of this nexus requirement “is to prevent [the] extraterritorial application of U.S. criminal laws from being ‘arbitrary or fundamentally unfair.’” *United States v. Van Der End*, 943 F.3d 98, 106 (2d Cir. 2019) (quoting *Epskamp*, 832 F.3d at 168). “For non-citizens acting entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests.” *United States v. Al Kassab*, 660 F.3d 108, 118 (2d Cir. 2011). “Where Congress expressly intends

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for a statute to apply extraterritorially, as [this Court] conclude[s] it did here, the ‘burden is a heavy one’ for a defendant seeking to show that extraterritorial application of the statute violates due process.” *Epskamp*, 832 F.3d at 168. Here, Adamu has not carried that “heavy” burden.

The Second Circuit’s decision in *Epskamp* - which Adamu does not address in his briefing - is dispositive. There, the defendant was a Dutch citizen who boarded a U.S.-registered charter plane in the Dominican Republic to travel to Belgium. The plane contained approximately 1,000 kilograms of cocaine. *Id.* at 159-60. “The government’s evidence showed that the conspirators deliberately sought out a United States-flagged aircraft in order to avoid . . . scrutiny . . .” *Id.* at 169. The Second Circuit reasoned that “[t]he United States plainly has an interest in prosecuting narcotics conspiracies that . . . secure United States-registered aircraft with the deliberate intent to exploit the perceived authority and lawfulness of such aircraft,” and that the defendant’s “behavior was self-evidently criminal” and thus “subject . . . to prosecution somewhere.” *Id.* (quoting *Al Kassir*, 660 F.3d at 119 (“Fair warning does not require that the defendants understand that they could be subject to criminal prosecution *in the United States* so long as they would reasonably understand that their conduct was criminal and would subject them to prosecution somewhere.” (emphasis in original))) Given these circumstances, *Epskamp*’s prosecution in the United States did not violate due process. *Id.*

The facts here are similar. Like *Epskamp*, Adamu is not a U.S. citizen. He flew between two countries that are outside of the United States, and none of his conduct

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was aimed at the United States. But Adamu, Landji, and Cardona-Cardona were aware that the G2 was a U.S.-registered plane with a U.S.-based owner. Landji's aviation company had hired Adamu as a pilot, and as a pilot, Adamu would understand the significance of the plane's "N" tail number, which indicates U.S. registration.⁵ Having chosen to use a U.S.-registered airplane with a U.S.-based owner to transport cocaine, Adamu and his co-defendants cannot contend that this prosecution violates due process. Accordingly, Adamu's motion to dismiss the charges against him for lack of jurisdiction will be denied.

CONCLUSION

For the reasons stated above, Defendants' pretrial motions are denied.

Dated: New York, New York
April 28, 2021

/s/ Paul G. Gardephe
Paul G. Gardephe
United States District Judge

5. Although the Government is not required to prove that the Defendants understood that their use of a U.S.-registered and U.S.-owned plane would subject them to prosecution in the United States, *see Al Kassir*, 660 F.3d at 119, there is evidence that the Defendants knew that the plane's relationship with the United States made them subject to prosecution in the United States. Indeed, Cardona-Cardona and Landji discussed altering the plane's tail identification to disguise its connection with the United States.